No. 75-1262

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

COUNTY OF TUOLUMNE

ON APPEALS FROM THE CALIFORNIA COURT OF APPEAL, FIFTH APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The findings of fact, conclusions of law, and memorandum of decision of the California Superior Court in *United States of America, et al.* v. *County of Fresno* (App. A, *infra*, pp. 1a-14a) are not offi-

cially reported. The opinion of the California Court of Appeal, Fifth Appellate District (App. B, *infra*, pp. 61a-71a) is reported at 50 Cal. App. 3d 633.

The findings of fact, conclusions of law, and memorandum of opinion of the California Superior Court in *United States of America, et al.* v. *County of Tuolumne* (App. A, *infra*, pp. 19a-56a) are not reported. The opinion of the California Court of Appeal, Fifth Appellate District, in *United States of America, et al.* v. *County of Tuolumne* (App. B, *infra*, pp. 72a-73a) is not reported.

JURISDICTION

The judgments of the California Court of Appeal in these cases (App. B, *infra*, pp. 71a, 73a; App. C, *infra*, pp. 74a-77a) were entered on August 13, 1975. The California Supreme Court denied timely petitions for hearing on October 9, 1975 (App. D, *infra*, pp. 78a-79a). Notices of appeal to this Court were filed on January 6, 1976 (App. E, *infra*, pp. 80a-83a).[1] By order dated December 30, 1975, the Chief Justice extended the time for docketing these appeals to and including March 7, 1976 (a Sunday).

The California Court of Appeal held that the imposition of a state possessory interest tax upon the

[1] Notices of appeal were filed in both the California Court of Appeal (App. E, *infra*, pp. 80a-83a) and in the California Superior Courts (App. F, *infra*, pp. 84a-87a) because of uncertainty as to the location of the record. In the *County of Fresno* case, the notice of appeal was filed in the Superior Court on January 7, 1976.

occupancy by employees of the United States Forest Service of government-provided housing quarters located in national forests did not violate the Supremacy Clause of the United States Constitution. The jurisdiction of this Court is conferred by 28 U.S.C. 1257(2), which authorizes a direct appeal to this Court from the final judgment by the highest court of a state in which a decision could be had where the constitutionality of a state statute is drawn into question and the decision is in favor of its validity. See, *e.g.*, *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of Article VI of the United States Constitution, 5 U.S.C. 5911, 16 U.S.C. 500, Sections 102-104, 107 and 201 of the California Revenue and Taxation Code (West 1970), and Section 4654 of the California Public Resources Code (West 1972) are set forth in App. G, *infra*, pp. 88a-93a.

QUESTION PRESENTED

Whether the imposition of the California annual tax on possessory interests in improvements on tax-exempt land based upon the value of the occupancy rights of employees of the United States Forest Service in housing quarters which are owned by the federal government and assigned to them as a condition of their employment violates the immunity of

the United States from state taxation as provided by the Supremacy Clause of the Constitution.

STATEMENT

Pursuant to its authority under 16 U.S.C. 471 and 472, the United States Department of Agriculture is charged with the responsibility of executing the laws affecting the public lands reserved as national forests. Pursuant to 16 U.S.C. 480, the civil and criminal jurisdiction of the states within such national forests is not affected. In order to protect and administer the national forests, the Forest Service of the Department of Agriculture has constructed housing quarters within the national forests which it requires to be occupied by a Forest Service employee. The assignment of federal employees to such housing quarters is authorized by 5 U.S.C. 5911(b) "when conditions of employment or of availability of quarters warrant the action" (App. A, *infra*, pp. 1a, 3a, 9a-10a, 24a, 31a, 43a).

The individual appellants are Forest Service employees who were assigned as a condition of their employment to occupy housing quarters in national forests located in the Counties of Fresno and Tuolumne in California. The housing quarters in question range from one-bedroom to three-bedroom dwelling units and many of them are in remote areas of the national forests. Because there are more Forest Service employees than such housing quarters, not every employee is assigned to occupy these facilities. However, some employees are assigned to

these housing quarters because of the nature of their duties (*e.g.*, fire surveillance). Other employees are required to occupy these quarters because of the Forest Service's policy that each dwelling must be occupied. Thus, the employees have no freedom of choice in connection with their housing assignments (App. A, *infra*, pp. 1a-3a, 5a, 9a, 11a, 25a, 31a, 43a, 50a, 52a; App. B, *infra*, p. 63a).

Those assignments were made unilaterally by the Forest Service solely on the basis of its needs in accordance with the criteria set forth in 5 U.S.C. 5911, Bureau of Budget Circular A-45, and the Forest Service Manual, together with its regional supplement. The Forest Service employees occupying such quarters were charged a fee in accordance with an official schedule and based upon the number of days of occupancy during the preceding pay period. The fee was withheld from the employees' bi-weekly pay checks (App. A, *infra*, pp. 1a-5a, 11a-12a, 27a-31a, 43a-45a, 52a-53a; App. B, *infra*, p. 63a).

The privacy of the Forest Service employees occupying the housing quarters was severely diminished. Thus, for example, the Forest Service retained full rights of access to these dwellings. The units were locked by Forest Service locks, which could be opened by a single Forest Service master key to which all Forest Service employees had access. Forest Service officers were permitted to enter these quarters at any time and were at liberty to station additional personnel in the quarters if conditions made it neces-

sary. The public was invited to visit Forest Service employees at their housing quarters when other Forest Service facilities were closed. The employees had no fixed right of occupancy to the particular quarters they occupied (App. A, *infra*, pp. 2a, 4a, 11a, 32a-35a, 38a-39a, 44a, 53a; App. B, *infra*, pp. 63a-64a).

There was no written lease or other document between the employees occupying such quarters and the Forest Service. The employees' occupancy was immediately terminable at any time without any prior notice by the Forest Service. The employees had no right to sublet or to assign their right of occupancy and were permitted to make repairs, alterations, or modifications to the units only with the consent of their superiors. Pursuant to Section 0.735-11(p) of the Forest Service Regulations (7 C.F.R. (1971)), the employees were prohibited from using the quarters "for other than officially approved purposes" (App. A, *infra*, pp. 2a, 4a-5a, 11a-12a, 31a-32a, 35a, 37a-38a, 45a, 52a-53a; App. B, *infra*, p. 63a).

Under Sections 103, 104, 107 and 201 of the California Revenue and Taxation Code, an annual tax upon possessory interests in improvements on tax-exempt land is imposed. Respondents determined that the housing quarters occupied by the individual appellants in connection with their federal employment were possessory interests in improvements on tax-exempt land and were subject to the tax. Respondents computed the value of the possessory interests in the improvements by computing the discounted value of the rent of a comparable dwelling exclusive of land and the value of the reversionary interest after the estimated period of occupancy. The respondents excluded from their calculations the value of office or other governmental areas that were open to the public and took into account the risk of termination of occupancy. After deriving two separate values based upon the capitalization of rent and the valuation of the property less the reversionary interest, a final appraisal was made in accordance with the judgment of the appraiser (Tr. 179-188;[2] App. A, *infra*, pp. 2a, 10a, 51a; App. B, *infra*, p. 62a).

The Forest Service employees paid the assessed tax[3] in 1967 under protest and filed applications for refund, which were denied by respondents' boards of supervisors sitting as boards of equalizations (App. A, *infra*, pp. 2a, 10a-11a, 25a, 51a). In the first of these refund suits in which the individual appellants were joined by the United States, the Superior Court of Fresno County held that the Forest Service employees had no possessory interests

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[2] This reference is to the transcript of the trial in the *County of Fresno* case. For a description of the valuation procedures used by the County of Tuolumne, see App. A, *infra*, pp. 40a-42a.

[3] The taxes imposed on the individual appellants ranged from $3.03 to $91.31 per year (App. A, *infra*, pp. 10a, 15a-18a, 21a, 25a, 51a, 58a-60a).

subject to California tax. The court further held that, even assuming that they had such a taxable interest, the tax interfered in the relationship between the Forest Service and its employees and violated the constitutional immunity of the United States and its agents from state taxation. The court also ruled that the tax unconstitutionally discriminated against the United States and its employees, and was a forbidden double tax upon the possessory interests in federal forests under Section 102 of the California Revenue and Taxation Code because the United States made payments in lieu of taxes under 16 U.S.C. 500 (App. A, *infra*, pp. 4a, 6a-7a, 12a-14a). In the second case, the Superior Court of Tuolumne County held that the individual appellants had no possessory interests under California law and did not reach the other issues presented (App. A, *infra*, pp. 48a, 53a-55a).

The California Court of Appeal reversed in both cases (App. B, *infra*, pp. 61a-73a). It held that under California law the Forest Service employees had taxable possessory interests in the government housing quarters assigned to them and that the imposition of the tax did not violate the immunity of the United States against state taxation. In the court's view, "[a] possessory interest assessment is not made against the government or government property; the assessment is against the private citizen, and it is the private citizen's usufructuary interest in the government land that is being taxed" (App. B, *infra*, p. 68a).

The court of appeal also concluded that the federal government's payments under 16 U.S.C. 500 were not in-lieu-of tax payments. Accordingly, it rejected the argument that the possessory interest tax imposed double taxation prohibited by Section 102 of the California Revenue and Taxation Code (App. B, *infra*, pp. 69a-70a).

Finally, the court of appeal concluded that the tax did not discriminate against the United States. Although comparable possessory interests in state forests were not subject to tax, the court relied upon the fact that the counties receive payments in lieu of taxes pursuant to Section 4654 of the California Public Resources Code. Since the court concluded that the federal government's payments under 16 U.S.C. 500 were not in lieu of taxes, it found the California tax on possessory interests in federal forests did not discriminate against the United States (App. B, *infra*, pp. 70a-71a).

THE QUESTION IS SUBSTANTIAL

In holding that a state tax could be imposed upon the occupancy rights of employees of the United States Forest Service in housing quarters owned by the federal government and assigned to them as a condition of their employment, the California Court of Appeal has erroneously narrowed the immunity of the United States from state taxation as established by the decisions of this Court. The resolution of this issue has significant practical importance not only to employees of the United States Forest

Service stationed in the 15 national forests located in California, but also to their counterparts who are required to occupy similar housing facilities in California provided by the National Park Service, the Bureau of Indian Affairs, and the Bureau of Reclamation of the Department of Interior, and the Departments of the Army, Navy, and Air Force. Moreover, if the decision below stands, it is likely that other states will follow California's lead and attempt to tax the value of possessory interests of a large number of military and civilian federal employees who occupy federally owned housing quarters assigned to them in connection with their employment.

1. Only last Term in *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 612, this Court reaffirmed the doctrine first announced by Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, that the federal government is immune from state taxation. "[U]nshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." *United States* v. *County of Allegheny*, 322 U.S. 174, 177. See also *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 117-118. Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared" (*M'Culloch* v. *Maryland*, *supra*, 4 Wheat. at 436).

The California tax upon the possessory interests

of Forest Service employees in housing quarters assigned to them by the federal government as a condition of their employment is a levy upon the activities of the United States. It is beyond question that California could not subject the United States to a real estate tax upon the value of its ownership interest in the housing quarters located within the national forests. While the possessory interests of the Forest Service employees in the housing units assigned to them is conceptually distinct from the ownership interest of the United States, their occupancy of such quarters was for the sole purpose of discharging their governmental function of protecting the national forests. Thus, the fact that they paid rent and perhaps derived some incidental personal benefits from their occupancy does not detract from the fact that their presence in such housing was primarily for the benefit of the United States in furtherance of the activities of the federal government. A state tax on such an activity violates the Supremacy Clause of the Constitution. See *United States* v. *Rickert*, 188 U.S. 432.

Although the court of appeal acknowledged the force of the federal immunity doctrine, it held that it was inapplicable to the tax at issue because "[a] possessory interest assessment is not made against the government or government property; the assessment is against the private citizen, and it is the private citizen's usufructuary interest in the government land that is being taxed" (App. B, *infra*, p. 68a). In so concluding, the court of appeal relied

upon *City of Detroit* v. *Murray Corp.*, 355 U.S. 489; *United States* v. *Township of Muskegon*, 355 U.S. 484; and *United States* v. *City of Detroit*, 355 U.S. 466. But those cases involved the entirely distinguishable situation of a state tax upon a private contractor's use of federally owned property in connection with its own commercial activities. Under those circumstances, the tax was upheld because the private contractor was not deemed to be an instrumentality of the United States. However, in *Township of Muskegon*, the Court explained the basis of those decisions in the following terms, which are pointedly applicable here (355 U.S. at 486):

> The case might well be different if the Government had reserved such control over the activities and financial gain of [the private contractor] that it could properly be called a "servant" of the United States in agency terms. But here [the contractor] was not so assimilated by the Government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them.

There can be no doubt in this case that the Forest Service employees were servants of the United States in the fullest sense of that word, since their activities were under the complete supervision of their federal employer. Moreover, their occupancy of the housing quarters was subject to a pervasive system of governmental controls designed to further the protection of the national forests. Their assignment to their

dwellings was required as a condition of their employment and they had no right to remain there when the federal government so directed. In this sense, the deployment of Forest Service personnel to such quarters is directly analogous to the assignment policies of the armed forces. Accordingly, the Forest Service employees' use of the housing quarters was a governmental activity that cannot be subjected to state taxation.

2. The California tax is likewise unconstitutional because it discriminates against the federal government and its employees. Apart from the fundamental constitutional doctrine that the federal government is immune from state taxation, it is an equally well settled corollary of that rule that a state may not discriminate against the federal government. See, *e.g.*, *Phillips Co.* v. *Dumas School District*, 361 U.S. 376, 385-387; *Moses Lake Homes* v. *Grant County*, 365 U.S. 744, 751; *City of Detroit* v. *Murray Corp.*, 355 U.S. 489. As the Court stated in *United States* v. *City of Detroit*, *supra*, 355 U.S. at 473: "It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals."

Here, the California tax unfairly discriminates against the federal government because it is not imposed upon possessory interests in state forests. This disparity in treatment between comparable interests in state and federal forests works an unconstitu-

tional discrimination against the federal government since "it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself" (*Phillips Co.* v. *Dumas School District*, *supra*, 361 U.S. at 385).

The court of appeal attempted to justify the discriminatory impact of the California tax on the ground that the State of California compensates its counties for the loss of tax revenue with respect to state forests by making in-lieu-of tax payments to the counties pursuant to Section 4654 of the California Public Resources Code (App. B, *infra*, p. 91a). But the federal government has made similar in-lieu-of-tax payments to the states since 1906 for the benefit of the public schools and public roads of the counties in which national forests are situated. See 16 U.S.C. 500, Appendix G, *infra*, p. 88a. The possessory interests in both state and federal forests in California are therefore on a comparable economic footing. Thus, if the state does not tax possessory interests in its own forests, it cannot do so with respect to those located in national forests.[4]

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[4] The court of appeal's rejection of the argument that the payments made by the United States under 16 U.S.C. 500 were in lieu of taxes (App. B, *infra*, pp. 69a-70a) is explicitly refuted by the pertinent legislative history of that statute. See H.R. Rep. No. 4979, 59th Cong., 1st Sess. (1906); See H.R. Rep. No. 295, 63d Cong., 2d Sess. 55 (1914); 40 Cong. Rec. 7355 (1906); 42 Cong. Rec. 5925, 6058-6059, 6061 (1908).

International Paper Co. v. *County of Siskiyou*, 515 F.2d 285 (C.A. 9), upon which the court of appeal relied (App. B, *infra*, pp. 70a-71a), is distinguishable. There, the Ninth Circuit upheld a California county tax upon a private possessory interest in standing timber located in a national forest. Here, however, the question is whether the state tax can be imposed upon such a possessory interest of a person in his capacity as a federal employee. While the court in *International Paper Co.* rejected the argument that the tax was discriminatory because similar interests in state forests were not taxable, it did so on the ground that the purchasers of timber interests in state forests bore the burden of taxation indirectly through higher prices (see 515 F.2d at 289). Finally, the Ninth Circuit's statement that federal payments under 16 U.S.C. 500 are not in lieu of state taxes was not directed to the discrimination argument advanced in that case but only to buttress its conclusion, to which we take no exception, that 16 U.S.C. 500 does not of itself prevent state taxation of private possessory interests in national forests. See 16 U.S.C. 480.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APPENDIX A

Filed November 2, 1972

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

No. 136452 Dept. 1

UNITED STATES OF AMERICA, ET AL., PLAINTIFFS

vs.

COUNTY OF FRESNO, DEFENDANT

MEMORANDUM OF DECISION

A trial de novo is permitted in this case on the primary issues not involving valuation because on those issues a trial de novo is a matter of right. *McCaslin* v. *DeCamp*, 1967, 248 C.A.2d 13 and *Bd. of Supervisors* v. *Archer*, 1971, 18 C.A.3d 717. In view of the Court's Intended Decision, the question of whether a trial de novo as to valuation is proper need not be decided.

The essential facts of this case are as follows:

Plaintiff United States of America, through its Department of Agriculture, Forest Service, owns certain dwellings located in the Sierra and Sequoia National Forests, within the County of Fresno. The individual plaintiffs are assigned, by the Forest Supervisors, to occupy said dwellings as an incident of their employment and for the benefit of the Forest Service. See Title 5 U.S.C. Sec. 5911. They do not have a freedom of choice of premises in connection

with said assignments. By reason of their occupancy of said dwellings, an amount of money is thereafter withheld from their bi-weekly paychecks, in accordance with calculations made under Forest Service regulations, establishing the reasonable rental value to the employee. Their occupancy of the dwellings is subject to the determination of the Forest Supervisor as to how the most efficient use of the dwellings can be made, and individual employees are subject to directions to vacate the premises without notice. The premises are, in many instances, located in relatively inaccessible areas, since they are designed for such purposes as fire spotting, etc. They are locked by Forest Service locks, which can be opened by a single Forest Service master key, which all Forest Service employees have. Forest Service employees occupying such dwellings are required, upon request, to permit Forest Service officers to enter the dwellings. No written lease or other document exists between the individual plaintiff-employee and the Forest Service. Defendant's assessor determined that each individual plaintiff-employee had a taxable possessory interest as a result of his limited possession and/or use of the property. Taxes were thereupon collected under protest from the individual plaintiffs in the year 1967. Thereupon, this action was filed to recover those taxes.

Two of the above facts may create sometimes subtle, but nevertheless important, distinctions, vis-a-vis the many cases cited by both parties in their memorandums and briefs. Those two facts are that

the individual plaintiffs are employees of the federal government, not engaged in commercial activities on the subject property for their own respective benefiits, and that none of them had any right of possession or use, exclusively or otherwise, as against the federal government.

The case of *McCaslin* is the only cited case involving a factual situation that comes close to the subject case. However, there the court found that the plaintiff-employee of the public entity had a month-to-month tenancy which did in fact give him the right to exclusive possession, even against the public owner. In fact, the plaintiff-employee had, in his original Complaint, alleged under oath that he had an interest in the residence in question as a tenant on a month-to-month basis. The Court finds that this is not the situation in the case at bench.

Title 5 U.S.C. Sec. 5911(b), (c), (e), (f) set forth the authority for requiring or permitting federal employees to live in housing owned by the federal government. Pursuant to this section, plaintiffs were assigned to their respective government housing. The evidence showed that in certain cases a plaintiff was required to live in the housing assigned, and then required to pay rental on a daily basis through deductions from his bi-weekly paychecks after the occupancy and use had taken place. He had no choice but to comply with these requirements because the government, through its Forest Service, unilaterally determined that it was in the interests of the government to so assign him, and that the

quarters assigned had a value to the employee equal to the amount deducted from his subsequent paychecks. (Rent is also deducted in the same manner for plaintiffs who are not actually required to live in the government housing.)

If we assume the definitions set out in Title 18 of the California Administrative Code, Secs. 21, et seq. (not adopted until 1971), are applicable in this case, the defendants would still not be sufficiently justified in their position. This is true because, as plaintiffs point out, the Forest Service has "full access" to the quarters involved in this case. Indeed, there are no provisions contained in any of plaintiffs' exhibits in evidence wherein the employees are given any rights or privileges of exclusive possession or use. All provisions concerning the employees' occupancy and use are restrictive and make it clear that the federal government commits itself to nothing. The occupancy and use of the quarters by the employee-plaintiffs is completely subservient to the rights of the Forest Service and can only be called a license, terminable at will by the Forest Service without notice to the employee. This is the relationship the U.S. Government has clearly created. The State cannot alter the relationship without running afoul of the Supremacy Clause of the U.S. Constitution by interfering with the relationship between the U.S. and its employees. In this regard, it would also appear that, under the facts of this case, the Act for Admission of the State of California to the Union would be violated by imposition of the subject

tax for the reason that it would constitute an interference with the primary disposition of public lands by the U.S. to its own employees for governmental purposes.

Plaintiffs' exhibit in evidence make it clear that government purposes alone are the factors which determine when an employee can occupy the dwellings. The determination is made unilaterally by the government, acting through its agents, and the employee has no right to participation in the decision and no right by legal means or otherwise to even postpone the effectiveness of the governmental decision. He can be, and the evidence shows that he has been, dispossessed without notice when the government determines that an emergency such as fire, requires the use of the dwelling for purposes other than his occupancy. When this happens, the small rent payable is reduced proportionately on the basis of the number of days the employee actually occupied the dwelling during the preceeding two-week period. This deduction does not amount to a refund because the rents are not paid in advance as is customary in a landlord-tenant situation.

The Court is not unmindful of the fact that some or all of the plaintiff-employees may very well receive some benefit from their occupancy of the government houses, but this alone is not sufficient to create a taxable possessory interest. The California cases seem to turn upon whether the proposed assessee has a right to at least some degree of exclusive possession against the property owner. If he

does not, he is merely a licensee with an interest that does not qualify as a taxable possessory interest under the law. It is entirely possible that one or more of the plaintiffs who are required by the Forest Service to live where they are living may believe that to live elsewhere would confer much greater benefits. However, such employee may not make this decision for himself, anymore than he can decide whether or not to vacate the premises on government demand. The employee, under the above facts, does not have any discernable exclusive right to possession or use as against the government owner as required by the at 619. The employee-plaintiff enjoys no benefit of a lease term at all in this case.

McCaslin case and *Kaiser Co.* v. *Reid*, 30 C.2d, 610

The Court also holds that the "in lieu" payments by the federal government under Title 16 U.S.C. Sec. 500 were intended to replace the tax here imposed on the plaintiff-employees and that further payment would constitute double taxation. The legislative history of Sec. 500 attached to plaintiffs' Trial Memorandum seems to make it quite clear as to what Congress intended by enacting Sec. 500. Since the payments by the federal government under Sec. 500 are "in lieu" payments, and the employees are occupying government property for Forest Service purposes, there would be a resulting double taxation of governmental interests if the employees were required to pay taxes in spite of the "in lieu" payments. Double taxation is prohibited by Sec. 102 of the California Revenue and Taxation Code.

CONCLUSION

In summary, it can be stated that, in the Court's opinion, the peculiar facts involved in the assignment to and occupancy of governmental housing by the individual plaintiffs, creates a state of facts that can be distinguished from the facts existing in those cases cited by defendants where a taxable possessory interest was found to exist.

Dated this 1st day of November, 1972.

/s/ Blaine Pettitt
Judge of the Superior Court

Filed January 8, 1973

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IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

No. 136452

UNITED STATES OF AMERICA, ET AL., PLAINTIFFS

vs.

COUNTY OF FRESNO, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on May 18 and May 19, 1972, in Department No. 1 of the above entitled Court, the Honorable Blaine Pettitt presiding. Dwayne Keyes, United States Attorney, by Richard W. Nichols, Assistant U.S. Attorney, appeared as counsel for plaintiffs. Robert M. Wash, County Counsel, by James B. Waterman, Deputy County Counsel, appeared as counsel for defendant. Evidence, both oral and documentary, having been taken, and arguments having been heard, and the matter having been taken under submission, and the parties having briefed the cause, and the

Court being fully advised in the premises, and good cause appearing therefor, the Court now therefore, on request of both parties, does hereby make the following.

FINDINGS OF FACT

1. Plaintiff United States of America is a corporate sovereign and body politic. Plaintiffs Paul T. Meischke, Donald J. Cooley, Robert N. Thompson, Herbert J. Kendall, Charles Goughnour, Joel M. Criswell, Richard L. Nichols, William P. Cook, John R. Boswell, F. Weldon Sharp, Frank E. Crane, Robert Zwirtz, Paul Spivey, Thomas Adams, Jesse R. Luna, Lawrence L. Cabodi, and Harold F. Sebring, Jr., hereinafter collectively referred to as "the individual plaintiffs", were at all material times, including March 1967, employed by plaintiff United States of America in the Forest Service of its Department of Agriculture.

2. Defendant County of Fresno is a political subdivision and body politic of the State of California.

3. At all material times, including March 1967, the individual plaintiffs were assigned to duty stations by the Forest Service, United States Department of Agriculture, in Fresno County in connection with the protection, maintenance and administration of the Sierra National Forest and the Sequoia National Forest. At said times, said individual plaintiffs were occupying, under assignment by and at the pleasure of the United States of America, living quarters in certain lands and dwellings owned by the United States of America, as an incident of their

employment, pursuant to Title 5 U.S.C. § 5911, for the benefit of the United States of America.

4. Defendant's assessor determined that the individual plaintiffs had possessory interests in the respective quarters occupied by them, in March 1967, and on the basis of said determination assessed the said possessory interests at the respective valuations and levied taxes against the individual plaintiffs in the following respective amounts:

	Assessed Value		
Name of Employee	Land	Improvements	Tax
Paul T. Meischke	$30	$180	$10.43
Donald J. Cooley	80	100	8.26
Robert N. Thompson	30	210	11.01
Herbert J. Kendall	30	180	10.63
Charles Goughnour	30	120	6.88
Joel M. Criswell	30	150	8.26
Richard L. Nichols	30	180	10.63
William P. Cook	10	130	7.09
John R. Boswell	20	50	4.11
F. Weldon Sharp	30	180	10.63
Frank E. Crane	30	40	3.54
Robert Zwirtz	30	30	3.03
Paul Spivey	20	70	6.32
Thomas Adams	20	90	7.73
Jesse R. Luna	20	70	6.32
Lawrence L. Cabodi	20	90	7.73
Harold F. Sebring, Jr.	20	150	11.95

5. On August 31, 1967 the individual plaintiffs paid the taxes set forth in paragraph 4 of these findings of fact, under written protest. On September 15, 1967, the United States of America and the individual plaintiffs filed an application for cancellation or reduction of said assessments and for refund of said taxes paid. Said application was heard before defendant's Board of Supervisors, sitting as a Board of Equalization, on November 15, 1967, and was denied.

6. In their occupancy of the quarters to which they were assigned, the individual plaintiffs had no right of possession, exclusive or otherwise, as against the United States of America. Such occupancy on the part of the individual plaintiffs was terminable at the will of the United States of America, without prior (B.P.) notice to the individual plaintiffs. The necessity for and propriety of such occupancy was determined solely on the basis of governmental needs and governmental purposes, unilaterally by the United States of America through its agents, on the basis of criteria set forth in Title 5 U.S.C. § 5911, Bureau of the Budget Circular A-45, the Forest Service Manual, and the Region 5 Supplement to the Forest Service Manual. In general terms, decisions as to occupancy were made by the Forest Service on the basis of its determination of the most efficient use of particular quarters, and the individual plaintiffs had no right to participate in the assignment decisions.

7. The United States of America retained full rights of access to the quarters occupied by the individual plaintiffs. A single master key fit all locks on the quarters occupied by the individual plaintiffs. No written lease or other occupancy agreement existed between the United States of America and the individual plaintiffs. The individual plaintiffs did not engage in or use the assigned quarters for their individual commercial purposes, but rather used said quarters solely for the purposes of the United States,

(B.P.) even though they may have enjoyed some incidental personal benefits. In fact, they were specifically prohibited by Forest Service Regulation (Title 7 C.F.R. § 0.735-11(p)) from using such premises "for other than officially approved purposes."

8. The United States of America withheld from the biweekly paychecks of the individual plaintiffs sums of money determined by the United States of America to constitute the reasonable rental value to said individual plaintiff employees of the quarters to which they had been assigned. Said withholdings were made after the bi-weekly period of occupancy, and were adjusted in the event that an employee did not actually occupy the quarters for the entire two week period.

9. Defendant's assessor erred in determining that the individual plaintiffs had possessory interests in the quarters occupied by them in March 1967, and erred in assessing possessory interests against said individual plaintiffs. No such possessory interests existed in favor of the individual plaintiffs as to the quarters occupied by them in March 1967.

10. Defendant's assessor erred in attempting to assess possessory interest taxes against the individual plaintiffs, because such assessments constituted an interference with the relationship between the United States of America and its employees, and further because such assessments interfered with the primary disposition of public lands by the United States of America to its own employees for governmental purposes.

11. Defendant's assessor erred in attempting to assess possessory interest taxes against the individual plaintiffs, because such assessments constituted double taxation of governmental interests, by reason of the "in lieu" payments received by the State of California, and distributively by defendant, from the United States of America under the provisions of Title 16 U.S.C. § 500.

12. The individual plaintiffs are entitled to have the possessory interest taxes paid by them, as set forth in paragraph 4 of these findings of fact, returned to them, together with interest thereon at the legal rate from August 31, 1967.

And from and in connection with the foregoing Findings of Fact, the Court now makes the following

CONCLUSIONS OF LAW

1. The interests of the individual plaintiffs in the quarters occupied by them in March 1967 did not constitute possessory interests within the meaning of California Revenue and Taxation Code § 107.

2. Defendant's assessor's attempt to assess and collect possessory interest taxes against and from the individual plaintiffs violated the Supremacy Clause of the United States Constitution, Article VI, Clause 2, by interfering with the relationship between the United States of America and its employees.

3. Defendant's assessor's attempt to assess and collect possessory interest taxes against and from the individual plaintiffs violated Section 3 of the Act for Admission of the State of California, 9 Stat. 452, by interfering with the primary disposition of

public lands by the United States of America to its own employees for governmental purposes.

4. Defendant's assessor's attempt to assess and collect possessory interest taxes against and from the individual plaintiffs violated Section 102 of the California Revenue and Taxation Code, by creating double taxation against governmental interests, in view of the "in lieu" payments received by defendant distributively from the United States of America under the provisions of Title 16 U.S.C. § 500. Said double taxation created a discrimination against the United States of America and against plaintiffs, in violation of the Supremacy Clause of the United States Constitution.

5. Since the individual plaintiffs had no taxable possessory interests in the quarters occupied by them in March 1967, the issues raised by the United States of America and the individual plaintiffs concerning the propriety of the valuation of the possessory interests assessed against the individual plaintiffs are moot.

6. The individual plaintiffs are entitled to a refund of the possessory interest taxes paid by them, under protest, as set forth in paragraph 4 of the Findings of Fact, together with interest thereon at the legal rate from August 31, 1967.

DATED: January 8, 1973

/s/ Blaine Pettitt
Judge of the Superior Court

Filed January 8, 1973

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IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

No. 136452

UNITED STATES OF AMERICA, ET AL., PLAINTIFFS

vs.

COUNTY OF FRESNO, DEFENDANT

JUDGMENT

This Court having heretofore made and entered its Findings of Fact and Conclusions of Law, which are filed concurrently herewith and incorporated herein by reference as though fully set forth herein, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs, and each of them, have and take judgment against defendant;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Paul T. Meischke have and recover from defendant the sum of $10.43, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Donald J. Cooley have and recover from defendant the sum of $8.26, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Robert N. Thompson have and recover from defendant the sum of $11.01, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Herbert J. Kendall have and recover from defendant the sum of $10.63, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Charles Goughnour have and recover from defendant the sum of $6.88, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Joel M. Criswell have and recover from defendant the sum of $8.26, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Richard L. Nichols have and recover from defendant the sum of $10.63, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff William P. Cook have and recover from defendant the sum of $7.09, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that John R. Boswell have and recover from defendant the sum of $4.11, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff F. Weldon Sharp have and recover from defendant the sum of $10.63, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Frank E. Crane have and recover from defendant the sum of $3.54, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Robert Zwirtz have and recover from defendant the sum of $3.03, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Paul Spivey have and recover from defendant the sum of $6.32, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Thomas Adams have and recover from defendant the sum of $7.73, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Jesse R. Luna have and recover from defendant the sum of $6.32, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Lawrence L. Cabodi have and recover from defendant the sum of $7.73, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Harold F. Sebring, Jr., have and recover from defendant the sum of $11.95, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each and all of the possessory interest assessments made and entered by defendant against each and all of the plaintiffs herein, except plaintiff United States of America, for the tax year 1967-1968, be, and the same are hereby, cancelled as void, illegal and of no effect.

DATED: January 8, 1973.

/s/ Blaine Pettitt
Judge of the Superior Court

Filed April 2, 1973

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TUOLUMNE

No. 11317

UNITED STATES OF AMERICA, in its own behalf and on behalf of C. W. BATES, J. RUSK, JR., J. R. ALVIS, R. A. GILKEY, S. G. MAUK, T. W. RALLS, D. J. SCHROEDEL, R. C. HENSLEY, C. G. WESTRATE, M. H. HOLLOWAY, J. R. SEILS, and R. K. SEMMENS, each suing in his own behalf, PLAINTIFFS

vs.

COUNTY OF TUOLUMNE, DEFENDANT

MEMORANDUM OF OPINION

The above-entitled matter came on regularly for trial on November 27, 1972, before Hon. Ross A. Carkeet, sitting without a jury. Richard W. Nichols, Esq., Assistant U. S. Attorney appeared on behalf of Dwayne Keyes, Esq., U. S. Attorney, representing plaintiffs. Stephen Dietrich, Jr., Esq., County Counsel, appeared as attorney for defendant, County of Tuolumne. The matter was tried on November 27 and 28, 1972, and ordered submitted on briefs. Closing brief was filed herein and the matter ordered submitted.

NATURE OF ACTION

Plaintiffs' complaint was filed herein on February 21, 1968, and alleges in substance:

1. The corporate and political sovereignty of plaintiff United States of America.

2. That at pertinent times herein the individual plaintiffs were employed by the United States of America (hereinafter called the Government) in the Forest Service of its Department of Agriculture and were assigned to duty stations in Tuolumne County in connection with the protection, maintenance and administration of the Stanislaus National Forest.

3. That defendant County of Tuolumne is a political subdivision and body politic of the State of California.

4. That the Government has brought this action at the request of its Department of Agriculture and under the direction of its Attorney General, in its own behalf and on behalf of the individual plaintiffs because of its interest as sovereign in vindicating its immunity under the Federal Constitution from state and local taxation and in protecting its employees from illegal assessments against them in contravention of rights derived from said immunity.

5. That on the first Monday in March, 1967, and at all times pertinent thereafter, the Government owned in fee simple and was in actual possession of certain lands and dwellings in Tuolumne County which the Government, acting through its Forest Service, held, maintained and used as living quarters

for its employees as provided by Congress in Title 5, United States Code, Section 5911.

6. On the first Monday in March, 1967, each of the individual plaintiffs has been assigned by the Government to, and was occupying, at the Government's pleasure, living quarters in such dwellings as an incident of, and in part compensation for, his employment.

7. That the Tuolumne County Assessor, determining that each individual plaintiff had a possessory interest in the respective quarters occupied by him, assessed the purported possessory interests at the respective valuations and levied taxes against the individual plaintiffs in the following respective amounts:

	Assessed Value		
Name of Employee	Land	Improvements	Tax
Bates, C. W.	$120	$ 970	$78.37
Rusk, J. Jr.	120	1150	91.31
Alvis, J. R.	120	410	38.11
Gilkey, R. A.	120	1010	81.25
Mauk, S. G.	120	1150	91.31
Ralls, T. W.	120	920	74.78
Schroedel, D. J.	200	1040	86.06
Hensley, R. C.	200	750	65.93
Westrate, C. G.	200	1050	86.75
Holloway, M. H.	200	300	35.30
Selis, J. R.	200	650	58.99
Semmens, R. K.	200	1050	17.35

8. That the individually above-named plaintiffs, pursuant to instructions from the Government, paid said taxes on August 31, 1967, under protest.

9. That the Government and the individual plaintiffs filed an application for cancellation or reduction

of said assessments and for refund of the taxes paid, which application was heard before defendant County's Board of Equalization on November 14, 1967, and denied.

10. The protest and application were made, and this action brought upon the grounds that said taxes were erroneously and illegally assessed because, among other reasons:

(a) No tax is provided for under California Law since none of the individual plaintiffs had a taxable possessory interest in the quarters occupied by him; and

(b) The provisions of California law, if and insofar as they provide for said taxes, violate the Constitution of the United States of America and the State of California because of infringement of the immunity of the United States from State and local Taxation and infringement of the rights derived therefrom by the individual plaintiffs, each of whom occupied the quarters assigned to him as a servant of and behalf of the United States; and

(c) Even if any of the individual plaintiffs had a taxable possessory interest, the assessment against him was excessive, erroneous and void;

(i) because it taxed a possessory interest different from the possessory interest which he had; and

(ii) because predicated on an excessive valuation of the possessory interest which, in fact had no value.

11. This action is brought upon the additional grounds that defendants Board of Supervisors, sitting as the Board of Equalization arbitrarily disregarded the evidence adduced at the hearing, in refusing to cancel or reduce said assessments and order refunds as prayed by plaintiffs, and therefore, acted erroneously, illegally and fraudulently.

Plaintiffs seek judgment canceling the assessments against the individual plaintiffs as illegal, void and no effect; reducing the assessments to valuations of zero in each instance, or to such valuations as the court determines to be equitable, should the court find the plaintiffs to have lawfully taxable possessory interests in the quarters they occupy; and directing the refund, with interest, of the taxes paid by plaintiffs, or such portion thereof as the court determines to have been improperly and illegally levied.

On October 23, 1969, defendant filed its First Amended Answer in which defendant admitted the allegations contained in paragraphs 1, 2, 3, 4, 7, 8 and 9 of plaintiffs' complaint.

Answering Paragraph No. 5 defendant admits Government ownership in fee simple of the lands and buildings involved but denies that the Government was in actual possession of said lands and dwellings.

Answering Paragraph 6 of the complaint defendant admits that during the times involved each of the individual plaintiffs had been assigned to and was occupying living quarters in such dwellings as an incident of his employment, but denies that such occupancy was at the pleasure of the Government.

Defendant denied, for lack of information or belief, the allegations in Paragraph 6 that said occupancies were in part compensation for the employment of the individual plaintiffs.

Defendant further alleged that at all times herein mentioned, each individual plaintiff was in actual and exclusive possession of the Government-owned dwelling which he occupied, that he paid a monthly rental therefor, and that the amount of this monthly rental was appreciably less than rents paid by other persons for privately owned similar facilities in the same area of Tuolumne County.

Plaintiffs filed a motion for summary judgment which was denied by the Court.

A pre-trial conference was held herein and a pre-trial Order made herein on August 20, 1971.

AGREED FACTS

At a pre-trial hearing on August 20, 1971, the following facts were agreed upon, as set forth in the Pre-Trial Conference Order of the same date:

1. Plaintiff United States is a corporate sovereign and body politic.

2. During the times involved the individual plaintiffs were employed by plaintiff Government in the Forestry Service of its Department of Agriculture and were assigned to duty stations in Tuolumne County in connection with the protection, maintenance and administration of the Stanislaus National Forest.

3. Defendant County of Tuolumne is a political subdivision and body politic of the State of California.

4. The Government brings the action on its own behalf and in behalf of the individual plaintiff because of its interest as sovereign in vindicating its immunity and the U. S. Constitution from state and local taxation and in protecting its employees from illegal assessments against them in contravention of rights derived from said immunity.

5. Fee ownership of the lands and buildings involved by the Government on the first Monday in March, 1967, same being held and used as living quarters for its employees.

6. On said date each of the individual plaintiffs had been assgined by the Government to, and was occupying such living quarters in such dwellings as an incident of his employment.

7. The assessed values of the land and improvements assessed to each of the individual plaintiffs and the taxes levied thereon are as set forth in Paragraph 7 of the complaint.

8. Said individual plaintiffs, pursuant to instructions of the Government paid said taxes under written protest on August 31, 1967.

9. On September 14, 1967, the Government and the individual plaintiffs filed an application for cancellation or reduction of said assessments and for refund of said taxes and said application was heard by the Board of Supervisors of defendant county, sitting as a Board of Equalization on November 14, 1971, and was denied.

ISSUES TO BE RESOLVED

a. Whether the individual plaintiffs' interests are taxable possessory interests as defined in Revenue and Taxation Code Section 107?

b. If they are taxable possessory interests under Sec. 107, is this in violation of the doctrine of sovereign immunity as made applicable by the supremacy clause of the U. S. Constitution? This issue also includes: (1) Whether or not it violates the supremacy clause of the State Constitution; (2) Whether or not it violates the Act of Admission of the State of California; (3) whether it violates the prohibitions of the Revenue & Taxation Code against double taxation; (4) Whether it violates the prohibition against discriminating against the U. S. in matters of taxation (including Tit. 16 U.S.C. Sec. 500 —in lieu taxes—and Sec. 4654 Public Resources Code —exempting State Forests from possessory interests taxation)?

c. If the interests of plaintiffs are taxable possessory interests, is the Assessor's valuation excessive, arbitrary and discriminatory?

Procedurally, it is agreed that plaintiffs were entitled to a trial *de novo* on the first two issues. They also are in agreement that the Court is limited to the record before the Board of Supervisors, sitting as a Board of Equalization, on the third issue, under the substantial evidence rule, with this caveat, however, that if the record of the Board of Supervisors was deemed inadequate by the Court, plaintiffs would have the right to supplement it under the authority

of *Madera* v. *Holcomb* 259 CA 2d 226, 230-231 (and R.T. 1605.3).

ADDITIONAL FACTS AS FOUND BY THE COURT

1. In the utilization of rental quarters belonging to the Stanislaus National Forest certain basic criteria are followed and these are delineated in the (1) "Forest Service Manual". (Plaintiffs' Exhibit No. 3); (2) R-5 Western Regional Supplement No. 3 (Plaintiffs' Exhibit No. 4; (3) Bureau of the Budget Circular No. A-45, dated October 31, 1964 (Plaintiffs' Exhibit No. 5).

The following sections of the Forest Service Manual are pertinent to the instant litigation (Ex. 3):

"(a) Sec. 6445.03 relating to *policy*, which provides that "rental rates, and charges for other facilities made available in connection with the occupancy of rental quarters shall be based upon the reasonable value . . . in the circumstances under which provided, occupied, or made available". It further provides that rents or other charges may not be set to provide an inducement either in recruitment or rentention of employees, or as an inducement to encourage occupancy of government housing.

This section further notes that occupancy usually is permissive, rather than required by the Forest Service, but may be required when "the head of the agency concerned shall determine that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise."

(b) Sec. 6445.05 defines "*comparable housing*" as private housing that is "generally equivalent in size and quality to Government rental quarters, with the same number of bedrooms, and with generally equivalent amenities and facilities, including garage or carpet."

"*Private housing*" is defined as housing "rented on a 'landlord-tenant' basis, with rental rates reflecting the fair-market value of the accommodations to the tenant."

The following sections of the R-5 Western Regional Supplement (Ex. No. 4) are pertinent to the instant case:

(a) *Sec. 6445.03—Policy,* provides that an employee shall only be required to live in a Government dwelling when there is no other way to acquire a specific service or Government property cannot otherwise be adequately protected.

(b) *Sec. 6445.04*—makes the Forest Supervisor responsible for quarters classification according to the standard structure. He is also to assign the appropriate rent rate to each Government quarters according to the regional schedule. "Each quarters rent rate will be based on the quarters classification, the adjustments due to Consumer's Price Index, the amenities present, and the distance to the nearest established community."

(c) *Sec. 6445.1 Conditions of Occupying Quarters.* Provides that employees occupying Government Quarters shall have responsibility for proper maintenance of the building and notify the proper authority of any maintenance needed to prevent damage to the building.

(d) *Sec. 6445.23—Survey Procedures.* Provides for classification of dwellings on the basis of the primary purpose for which they were designated. "For example, modern 3-bedroom house designed for family occupancy in a Class-A structure, while a modern 10-man barracks is Class-E, etc."

Provides also that the questions of *exclusive versus non-exclusive* use must be considered in establishing dwelling classes and rates." Non-exclusive use permits moving other personnel into a building without approval of the employee or employees already living there. Exclusive use does not permit this."

The Bureau of the Budget Circular A-45 of October 31, 1964. (Exhibit No. 5) provides in part as follows:

(a) It reiterates the *policy* and *definitions* above quoted and further defines "incomparable housing". It sets forth rental principles as follows:

"6. *Principles*

(a) *Basic rent principle.* "When rental quarters are located within or adjacent to (nor more than five miles from the boundary of) an established community which offers a rental housing market, basic rental rates will be set at rates prevailing for comparable private housing in and adjacent to *that* community."

(b) If the rental quarters are not within or adjacent to such a community, agencies may (1) use rental rates in and adjacent to the nearby representative private community as a base for establishing comparable rentals, or (2) set basic

rental sales in comparison with the average of rental rates for comparable private housing in an economically homogenous area in which the rental quarters are located.

Adjustments upward or downward from the basic rates may, within specified limits, be made to accommodate such factors as unusual transportation costs, etc.

2. The line of organization as it existed in 1967 was as follows:

A Chief Forester with 9 Regions under his command. Each Region is administered by a Regional Forester. Each National Forest within a Region is administered by a Forest Supervisor. Each National Forest is divided into Ranger Districts and each such District is headed up by a District Ranger.

The Forest Supervisor is responsible for all the uses, resources and activities in his forest. The District Ranger has identical responsibilities as to his smaller unit.

3. In testing and analyzing private rental figures for Stanislaus National Forest under Sec. 6445.43, Sonora, in Tuolumne County, and Angels Camp and Altaville, in Calaveras County were the communities used and the sampled facilities were for 3 classifications, viz:

Class A—3 bedroom modern home;
Class B—2 bedroom modern home;
Class C—1 bedroom modern home.

4. Under Section 6445.03 the 3 conditions under which the Forest Supervisor could require the employee to live in Government quarters are:

(a) To provide service to the public;
(b) To protect natural resources;
(c) To operate necessary or specialized equipment.

5. There are no written agreements concerning occupancy. The quarters are normally assigned by the District Ranger (except that his own quarters are assigned by the Supervisor). The employee has no choice. He can state his preference, but the decision is the Ranger's.

6. Rent is paid through bi-weekly deductions from the employees pay check. He never sees the rent money and he has no negotiating power over the amount of rent.

7. The money withheld is for the period preceding the payment check. If the premises are not occupied for a part of the preceding two weeks, withdrawal is made on a computed daily rate of actual occupancy.

8. In most situations there is one residence for the District Ranger. If he chooses to live elsewhere, it may be done, provided the Supervisor lets some one else live in the Ranger's home.

9. The assignments are based on efficiency of use and a bachelor is low on the list and can be moved out to make room for a family if no other quarters are available.

10. The only recourse an employee has is an administrative appeal to the Supervisor to overrule the District Ranger. The Ranger's decision is a purely discretionary matter.

11. *Harold L. Mitchell* was in 1967 Branch Chief in charge of Work Load Analysis. Part of his responsibility was administering the Region's quarters rental program. After testifying in accordance with substantially all of the facts as above found by the Court, he further testified:

(a) An employee has no right to exclude the Ranger or Supervisor from his living quarters;

(b) The Ranger or Supervisor can enter the living quarters for *any* reason (but as a matter of courtesy it is not done). (However, if either suspected illegal use, or abuse of the premises, he could).

(c) The Ranger can move or shift the occupants at any time; no basic notice is required.

(d) In case of emergency the Ranger can temporarily move the occupants out and take over the premises.

(e) The employee has no right *on his own* to make any repairs, alteration or modification of the premises.

(f) The Ranger can adjust the rent upward and the employee cannot sublease.

(g) There is a standard Forest Service lock and key and the key fits all Forest Service buildings, including private living quarters. Virtually every employee has such a key and must return it on leaving the area.

(h) Occasionally the keys do get in the hands, of non-employees, such as contractors, specialty repairmen, etc.

(i) There are items of communication such as telephone and radios in some of the living quarters. Anyone who is a Forest Service Officer can go in and use the radio. It is designed to be available for 24 hour use.

(j) Witness was at one time Fire Control Officer for Stanislaus National Forest and is familiar with the living quarters occupied by all twelve plaintiffs on the first Monday of March, 1967.

(k) While it is true the Supervisor or District Ranger (usually acting through his fire control officer), can inspect the living quarters at any time, it is also true that it is an established procedure "as a matter of courtesy to give as much notice as possible."

(l) The employee is not supposed to put on a lock of his own—but might under some situations, for protection of his family—but he is supposed to get the Ranger's O. K.".

(m) Normally there is a radio in the fire control officers dwelling and any Forest Service Officer who has a key can go in and use the radio. This happens more frequently in the remote areas. "The 12 homes involved are not considered 'remote'."

(n) The employee can decline to live in the furnished quarters unless he is in a position that requires occupancy.

(o) The regulations provide that the Supervisor can enter to make certain inspections; this authority can be delegated down the line by the Supervisor to the Ranger.

(p) Inspections are primarily for the protection of the Forest and of the occupant.

(q) There is nothing that says the Supervisor or Ranger can go in for his own personal reasons, such as to make a sandwich, take a bath, etc.

(r) The Ranger determines which occupant shall have the radio, it is not a matter of choice among the occupants.

(s) The term "exclusive use" as used in the regulations means exclusive against the public and other employees, but not aganist superior officers.

11. *Robert E. Stokes* (*not* a plaintiff in this action), who is a Resource Fire Control Officer for Stanislaus National Forest has been employed in said Forest for eight years. He lives in private housing, but lived in Forest Service Housing fourteen years in Modoc and Lassen counties, within the national forests. He has experienced the following:

(a) While living in a compound he has had people come to his door and knock for information when the office was closed. This has occurred at all hours.

(b) He has actually had people, such as hunters, walk in without knocking—when he himself left the door unlocked.

(c) He has had to move on short notice, when he was single, to make the quarters available for a married couple—once with only one hour notice he had to vacate a trailer he occupied for a married couple to have it.

(d) He has lived in trailers, tents, two bedroom homes and barracks. He has *never* moved out of a family residence.

(e) He has never had a superior officer come in and use the living facilities, or any part of it without advance notice, nor has he ever had any superior officer come in and help himself for personal use such as food, bathing, sleeping, etc.

12. *Robert J. Patchin* (*not* a plaintiff in this action) is Administrative Officer for Stanislaus National Forest and has been since 1966. He testified that they follow the manual as it is followed in other forests. He testified as follows:

(a) As of the first Monday of March, 1967, the individual plaintiffs occupied dwellings belonging to the U.S. Forest Service and located in the Summit District and the Groveland District within Stanislaus National Forest as follows:

Summit District:

#1011 Daniel J. Schroedel
#1013 Robert K. Semmens
#1005 Robert C. Hensley
#1012 Carl G. Westrate
#1009 J. R. Seils
#1110 M. H. Holloway

Groveland District

#1015 Sam G. Mack
#1014 John Rusk, Jr.
#1104 James R. Alvis
#1006 Thomas N. Ralls
#1002 Riley A. Gilkey
#1001 Curtis W. Bates

(b) There are no written records indicating or showing that the occupancy of the Forest Service housing was *required* of any of the above plaintiffs.

(c) Being a unit head of a district (Ranger) or a fire control officer would require 24 hour availability for response. Carl Westrate was Ranger at Summit District and Robert C. Hensley Fire Control Officer in the same district. In Groveland District John Rusk, Jr. was Ranger and Thomas N. Ralls Fire Control Officer. The 24 hour demand would of necessity require them to live on the compound. The other occupanices might not necessarily be required.

(d) All who occupied such quarters were treated alike and subject to the same requirements, such as inspections, etc.

(e) The Groveland Compound is on highway 120, six or eight miles East of Groveland with no other immediate improvements in the area. Summit compound is in the heart of Pinecrest and surrounded by improvements.

(f) In each District the Fire Control Officer was the only one who had a radio in his home.

(g) No policies concerning inspections had been established in either district, other than as set out in the manual.

13. Four of the plaintiffs testified. They were *Carl G. Westrate*, who is now Assistant Branch Chief of the Division of Recreation, but who was Ranger of the Summit District in March, 1967, and who has spent 18 years in the Forest Service; *Robert C. Hensley* who is now District Fire Control Officer for Goose Neck District in Siskiyou County and was Fire Control Officer for Summit District in March, 1967; *Thomas W. Ralls*, who is now and was in March 1967, Fire Control Officer for Groveland District; Robert K. Semmens, now Recreation Officer for Shasta Lake District in Trinity National Forest and who was in March, 1967, Recreation Assistant for Summit District. Their testimony may be summarized as follows:

(a) *Carl G. Westrate*—has had to move in on occupants for emergency purposes, such as fire, and use their home for a headquarters; this happened at Brightman's Flat, and the family *elected* to move out; after two or three days the home was no longer used as headquarters and the family moved back in; they were given approximately ½ day's notice; he has never been moved out himself; no improvements could be made on the dwellings in his compound without his approval; he lived with his family in the same Government Quarters at Pinecrest for two years; the Brightman's Flat quarters were much smaller, used only for summer

occupancy and was the phone communication for the area—so it was used as part of the command post; he has had superiors come into his quarters to use the phone and the radio but never to help themselves for personal reasons such as food, drink, bathing, sleeping, etc.; it is a common practice as a matter of courtesy to give occupants *notice* of proposed inspection, in his previous location was there for six years and occupied two Government homes, three years each.

(b) *Robert C. Hensley*—he has had the public contact him at his Government residence and asked to use his phone, or for directions, or for the nearest rest rooms, and on occasion have had requests from the public even to use his bathroom; at Pinecrest Compound he felt obligated to serve even from our residences; on one occasion Ranger got a complaint from an L.A. woman that office was not open; Supervisor requested Ranger to answer and "I was directed to change the sign so it directed people to the back of the station—where we lived;" we would request strange locks be removed, because we felt we couldn't adequately protect the house with that type of lock; has not been moved out on short notice; but has seen (at other locations) others moved out in emergencies so their dwellings could be used for headquarters; he stayed in same quarters at Summit District for five or six years; as Fire Control Officer he'd inspect and normally would give advance notice of

inspection; he recited one fire experience in Arizona where some of the men went in one occupied quarters and took showers, but admitted it was in an isolated area and with permission of the occupants.

(c) *Thomas W. Ralls*—his quarters are close to the office and he has had numerous public contacts when office closed; except in case of emergency, he gives notice of intended inspection; radio is in his home and he keeps in 24-hour communication; "others *could* use the radio"; he now occupies different home—3 bedrooms—than he did in March, 1967; he moved at *own* request, and with Rangers permission, because his family increased; he is not required to stay at home after office closes; he has never had any superior officer or other employee come in and use any of the facilities without his permission.

(d) *Robert K. Semmens*—has had people referred to his residence for service when clerks in the office didn't know the answers; at Summit compound there were inspections at least once a year, sometimes twice; usually advance notice given; he has never been given short notice to vacate; he has never had any superior officers or other employees come into his quarters and help themselves to the use of facilities or supplies; he had no radio in his quarters at Summit District; he occupied the same quarters from 1966 to August, 1969 when he left Summit District.

14. No testimony was received at the trial on the question of the assessor's method of valuation. In arriving at the full cash value of the property the assessor used a replacement cost factor and according to the findings of the Board of Equalization: the ratio of the assessed value of the properties to the full cash value is 25%; the Assessor determined that the assessed value of each of the possessory interest was set forth on page 3 of this opinion; in valuing said possessory interests the Assessor determined the fair market value of each Forest Service residence; and that the Assessor used an estimated term of occupancy of five years in determining the value of said possessory interests.

15. The Board of Supervisors sitting as a Board of Equalization thereupon made the following Decision, based upon its Findings of Fact and Conclusions of Law:

"The Board hereby determines that the full cash value of each possessory interest is as follows:

	Full Cash Value	
Name of Employee	Land	Improvements
Bates, C. W.	$480	$3880
Rusk, J. Jr.	480	4590
Alvis, J. R.	480	1650
Gilkey, R. A.	480	4040
Mauk, S. G.	480	4590
Ralls, T. W.	480	3700
Schroedel, D. J.	800	4140
Hensley, R. C.	800	4210
Holloway, M. H.	800	1180
Seils, J. R.	800	2600
Semmens, R. K.	800	4210

"The Board further determines that in the County of Tuolumne the ratio of the assessed value of property to its full cash value is twenty-five (25) percent.

"The Board finds that the product of the full cash value of each of the possessory interests, as determined herein, and the ratio of its assessed value to its full cash value, as determined herein, equals the assessed value established by the Assessor for each of the possessory interests, as hereinabove set forth.

16. The plaintiffs do not contest any portion of the formula by which the Assessor imposed the possessory interests in question, other than the *term* of possession he found to exist, i.e. the term of five years.

17. This Court determined at trial, that the valuation question would rest on the record presented to the Board of Supervisors.

18. The Tuolumne County Assessor testified at the tax hearing before the Board that in order for him to determine the value of the possessory interests of plaintiffs it was necessary for him to establish a "term", that is, the estimated length of time the owner of a possessory interest would own such interest and that the term be used was five years, which was a reasonable estimate of the average length of time U. S. Forest Service employees were stationed in Tuolumne County before being transferred or terminated; that the five year term was arrived at by the Assessor's own "personal knowledge of the past history of the U. S. Forest Service in Tuolumne

County and my frequent personal contacts with Forest Service Personnel over a period of thirty-five years during which I worked as a surveyor, logging engineer, assistant manager and vice-president of Pickering and West Side Lumber Companies."

19. Although most of the plaintiffs had occupied their quarters only a year and a half or so as of the first Monday in March, 1967, half of them were still occupying their quarters on the 1st Monday in March, 1970.

DISCUSSION OF LAW AS APPLIED TO THE FACTS

Counsel for both sides of this controversy are to be commended for their presentation of legal arguments and points and authorities in this case. All have been read and carefully considered by this Court.

In its "Order Denying Motion For Summary Judgment", filed herein on January 26, 1971, this Court emphasized that there was no evidence at that time to show the Government claimed any right of entry into an occupied premises except for the purposes of inspection and that there was no evidence that the Government had any right to enter for any other reason. Reservation of the right of re-entry for the purposes of inspection is not uncommon, and where an employee rents and occupies with the understanding the Government has the right to enter at any time for that limited purpose, it does not destroy the tenant's exclusive possession. (*30 Cal. Jur. 2d 471*).

Since the Order Denying Motion for Summary Judgment the additional testimony and documentary evidence received since the trial have enlarged the record on the *factual* situation regarding the relationship between the Government and the individual plaintiffs and the nature of the tenancy between them, if indeed it can be called a "tenancy".

It is clear now from the evidence that probably the two Ranger plaintiffs and the Fire Control Officer Plaintiff were occupying their quarters because the 24-hour duty nature of their positions required it. The other individual plaintiffs could probably have occupied rental quarters elsewhere and held their jobs, but their presence in their respective compounds contributed a continuing service for the Government to the public at such times as the office was closed and at such times as the Fire Control Officer was absent.

A careful analysis of the whole of the testimony leads to the inescapable conclusion that the individual plaintiffs are assigned by the Ranger and/or Supervisor to occupy their respective dwellings as an incident of their employment and for the benefits of the Forest Service. (*Title 5 U.S.C. Sec. 5911*).

It is clear from the evidence that the employees have no freedom of choice of premises whatsoever in connection with the assignments of same. While they may make a statement of preference, the discretion of assigning officer is absolute.

As they have no freedom of choice in selecting living quarters, so they have no bargaining power ei-

ther as to amount of rental or time, place or method of payment of same.

The testimony clearly shows at this time that not only does the superior officer have the right of inspection at any time, but that inspection can be made without notice (although as a matter of courtesy it seldom is). A standard Forestry lock is required to be on each rental quarters and all superior officers and other authorized employees of the Forest Service have a key to that lock. (No exception to this lock requirement is made without permission of the Ranger and then on a purely temporary basis and with key supplied to the superior officer). While it is not the practice for the superior officer to make unannounced entries into the living quarters, he has the *right* and the *means* with which to do so.

Security in occupancy does not exist, because the rules require that the quarters must be put to the most efficient use. A single man can be evicted with no notice to make room for a married man; a married employee with no children can be evicted with no notice to make room for a married man with children; another occupant can be moved into an already occupied quarters without consent of the existing occupant for the purposes of sharing occupancy of the living quarters, at the sole discretion of the Ranger or Supervisor. (While this is usually limited to moving a single occupant into a quarters only occupied by single occupants, the power exists to move an occupant into a quarters occupied by a family).

All occupancies are subject to the right of the Government to immediately evict without notice, at any time the Government decides the quarters are needed for a communication center, command post, or any use the Ranger or Supervisor thinks, in his sole discretion, outweighs in efficiency occupant's use as a living quarters.

No occupant is permitted to make any alteration, improvement or repair to the quarters occupied by him without the consent of the superior officer.

There is no evidence in this case whatsoever showing that any month to month tenancy exists. The actual collection of money for payment of rental is done by a withholding deduction from the employees' bi-weekly payroll check. He has no say whatsoever in this manner of payment. Furthermore, the evidence discloses that this is really not a bi-weekly tenancy, because the payment is not an *advance* payment of rental, but a payment for the *past* two weeks use of the premises, or if for less than two weeks, then withholding deduction is made on a computed daily rate of occupancy.

The true fact of the matter is that none of the individual plaintiffs have a right to exclude the Ranger from entering his quarters, and the Ranger has no right to refuse the Supervisor entry into his quarters at any time, for any purpose.

The employee has no right to sublease any portion of the premises nor to move in anyone other than his immediate family.

No written lease or agreement setting forth any terms, term of tenancy or rate of rental exists be-

tween any of the individual plaintiffs and the Government.

This case is easily distinguishable, in the light of the whole trial testimony, from *McCaslin* v. *DeCamp* (1967) 248 CA 2d 13, cited by both counsel. *McCaslin* involved the taxability of a possessory interest of McCaslin who was an employee of Central California Irrigation District, a tax-exempt public agency. He and his family occupied a single-family residence belonging to the district and paid the district a monthly rental therefor. He paid his taxes on the possessory interest assessed by Stanislaus County, under protest, and sued to recover. In his first verified complaint he alleged he had no interest in the property "other than as a tenant in a month-to-month basis." In his first amended complaint he omitted the quoted words. The district contended that McCaslin occupied the property as an employee of and at the complete sufferance of the district, and at its request in connection with his employment and therefore since the property was being used for a district purpose it was tax-exempt. The Court said:

> "Plaintiffs' arguments are without merit. . . . until actual termination of his employment by the district he had the exclusive use and possession of the premises, not only for himself, but for his family as well. This exclusive use and possession was sufficient to create a possessory interest even though conditioned on McCaslin's employment, which could be terminated by the district. This is true for the test is not whether the tax-exempt agency has a right to

> terminate the tenancy or occupancy, or whether the taxpayer has a non-transferable interest, *but whether he has the exclusive use and possession of the property against all the world, including the owner.* (*Kaiser* v. *Reid*, supra, 30 Cal. 2d 610). In other words, if the employee's right to the use and possession of the employer's real property *is in common with other employees*, or *if it is subordinate to the right of possession of the employer, the employee's right is a mere permit or license which is not taxable.* But, if his use and possession are exclusive to others, including the employer, and particularly when he is paying rent therefor, it is a possessory interest under Revenue & Taxation Code section 107, and the right of the employer to terminate the employment and hence the occupancy is only a factor to be considered in fixing its value. . . ." (Underscoring added)

Since the filing of this Court's decision denying the summary judgment motion, the Fresno County Superior Court in the case of "U.S.A. vs. Fresno County No. 136452," rendered a decision (Hon. Blaine Petitt), in a case almost identical to the instant case, on November 1, 1972. The decision of that Court was in harmony with this Court as to the non-existence of a possessory interest on the factual situation.

In addition, the Fresno Court held such a tax violated the state constitutional provisions against double taxation as evidenced and expressed in Rev. & Tax. Code, Section 102.

A convincing argument is made out by plaintiffs' evidence of legislative history surrounding the enactment and amendment of Sec. 500 Title 16 U.S. Code, as attached to plaintiffs' "Trial Memorandum", and in which the legislators repeatedly referred to the 10%, and subsequently 25% Forest revenue payments to the Counties as an "in lieu" tax. This Court does not, however, rest its decision on such conclusion, in view of the following cases: *Board of Supervisors* vs. *Archer* (Modoc County) (1971) 18 CA 3rd 717, and *Georgia Pacific Corp.* v. *County of Mendocino* (1972) 340 F.Supp. 1061, in which both State and Federal courts considered the matter of Title 16 U. S. Code Sec. 500 as being "in lieu" of taxes and concluded such was *not* the case.

This Court bases its decision squarely on the factual situation which does not raise the occupancy of the individual plaintiffs to the dignity of a possessory interest, but rather justifies a finding only of mere permit or license.

Judgment should therefore be granted annulling and cancelling the tax and ordering refund of same to the individual plaintiffs, together with their costs of action. If findings are required, plaintiffs shall prepare same, and shall prepare and serve form of Judgment as required by California Rules of Court.

DATED: March 31st, 1973.

/s/ Ross A. Carkeet
Judge of the Superior
Court

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Filed May 14, 1973

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TUOLUMNE

No. 11317

UNITED STATES OF AMERICA, in its own behalf, et al., PLAINTIFFS,

vs.

COUNTY OF TUOLUMNE, a political subdivision of the State of California, DEFENDANT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on November 27 and November 28, 1972, before the Honorable Ross A. Carkeet, judge of the above entitled court, without a jury. Dwayne Keyes, United States Attorney, by Richard W. Nichols, Assistant U.S. Attorney, appeared as counsel for plaintiffs. Stephen Dietrich, Jr., County Counsel, appeared as counsel for defendant. Evidence, both oral and documentary, having been taken, and the matter

having been taken under submission, and the parties having briefed the cause, and the Court being fully advised in the premises, and good cause appearing therefor, the Court now therefore, on request of defendant, does hereby make the following

FINDINGS OF FACT

1. Plaintiff United States of America is a corporate sovereign and body politic. Plaintiffs C. W. Bates, J. Rusk, Jr., J. R. Alvis, R. A. Gilkey, S. G. Mauk, T. W. Ralls, D. J. Schroedel, R. C. Hensley, C. G. Westrate, M. H. Holloway, J. R. Seils, and R. K. Semmens, hereinafter collectively referred to as "the individual plaintiffs", were at all material times, including March 1967, employed by plaintiff United States of America in the Forest Service of its Department of Agriculture.

2. Defendant County of Tuolumne is a political subdivision and body politic of the State of California.

3. At all material times, including the first Monday in March 1967, the individual plaintiffs were assigned to duty stations by the Forest Service, United States Department of Agriculture, in Tuolumne County in connection with the protection, maintenance and administration of the Stanislaus National Forest. At said times, said individual plaintiffs were occupying, under assignment by and at the pleasure of the United States of America, living quarters in certain lands and dwellings owned by

the United States of America, as an incident of their employment, pursuant to Title 5 U.S.C. § 5911, for the benefit of the United States of America.

4. Defendant's assessor determined that the individual plaintiffs had possessory interests in the respective quarters occupied by them on the first Monday in March 1967, and on the basis of said determination assessed the said possessory interests at the respective valuations and levied taxes against the individual plaintiffs in the following respective amounts:

	Assessed Value		
Name of Employee	Land	Improvements	Tax
C. W. Bates	$120	$ 970	$78.37
J. Rusk, Jr.	120	1150	91.31
J. R. Alvis	120	410	38.11
R. A. Gilkey	120	1010	81.25
S. G. Mauk	120	1150	91.31
T. W. Ralls	120	920	74.78
D. J. Schroedel	200	1040	86.06
R. C. Hensley	200	750	65.93
C. G. Westrate	200	1050	86.75
M. H. Holloway	200	300	35.30
J. R. Seils	200	650	58.99
R. K. Semmens	200	1050	17.35

5. On August 31, 1967, the individual plaintiffs paid the taxes set forth in paragraph 4 of these findings of fact, under written protest. On September 14, 1967, the United States of America and the individual plaintiffs filed an application for cancellation or reduction of said assessments and for refund of said taxes paid. Said application was heard before defendant's Board of Supervisors, sitting as a Board

of Equalization, on November 14, 1967, and was denied.

6. In their occupancy of the quarters to which they were assigned, the individual plaintiffs had no right of possession, exclusive or otherwise, as against the United States of America. Such occupancy on the part of the individual plaintiffs was terminable at the will of the United States of America, without prior notice to the individual plaintiffs. The necessity for and propriety of such occupancy was determined solely on the basis of governmental needs and governmental purposes, unilaterally by the United States of America through its agents, on the basis of criteria set forth in Title 5 U.S.C. § 5911, Bureau of the Budget Circular A-45, the Forest Service Manual, and the Region 5 Supplement to the Forest Service Manual. In general terms, decisions as to occupancy were made by the Forest Service on the basis of its determination of the most efficient use of particular quarters, and the individual plaintiffs had no right to participate in the assignment decisions.

7. The United States of America withheld from the bi-weekly paychecks of the individual plaintiffs sums of money determined by the United States of America to constitute the reasonable rental value to said individual plaintiff employees of the quarters to which they had been assigned. Said withholdings were made after the bi-weekly period of occupancy, and were adjusted in the event that an employee did not actually occupy the quarters for the entire two-week period. The individual employees had no negoti-

ating power in connection with the amount of rent charged, as said amounts were established by the Forest Service on the basis of its surveys of available rental facilities in Sonora, Angels Camp and Altaville.

8. The United States of America retained full rights of access to the quarters ocupied by the individual plaintiffs. A single master key fit all locks on the quarters occupied by the individual plaintiffs, and the individual plaintiffs were prohibited from adding their own additional locks without the consent of their superiors. No written lease or other occupancy agreement existed between the United States of America and the individual plaintiffs. The individual plaintiffs had no right to exclude their superiors in the Forest Service from entry into the quarters, had no right to sublease the quarters, had no right to make alterations or modifications to the quarters without the consent of their superiors, and had no right to use the premises "for other than officially approved purposes." Title 7 C.F.R. § 0.735-11(p). The term "exclusive use" as it appeared in certain of the Forest Service regulations related to exclusivity between the occupant and members of the public or other Forest Service employees, but did not create a condition of exclusivity as between the individual employee and his superiors in the Forest Service.

9. Defendant's assessor erred in determining that the individual plaintiffs had possessory interests in the quarters occupied by them on the first Monday

in March 1967, and erred in assessing possessory interests against said individual plaintiffs. No such possessory interests existed in favor of the individual plaintiffs as to the quarters occupied by them on the first Monday in March 1967. The individual plaintiffs are therefore entitled to have the possessory interest taxes paid by them, as set forth in paragraph 4 of these findings of fact, returned to them, together with interest thereon at the legal rate from August 31, 1967.

And from and in connection with the foregoing Findings of Fact, the Court now makes the following

CONCLUSIONS OF LAW

1. The interests of the individual plaintiffs in the quarters occupied by them on the first Monday in March 1967 did not constitute possessory interests within the meaning of California Revenue and Taxation Code § 107. Defendant's assessor erred in determining that such interests constituted taxable possessory interests, and erred in assessing said possessory interests against the individual plaintiffs.

2. The individual plaintiffs are therefore entitled to a refund of the possessory interest taxes paid by them, under protest, as set forth in paragraph 4 of the Findings of Fact, together with interest thereon at the legal rate from August 31, 1967.

3. Since the individual plaintiffs had no taxable possessory interests in the quarters ocupied by them on the first Monday in March 1967, the issues raised

by the United States of America and the individual plaintiffs concerning the questions of whether the assessment and collection of said possessory interest taxes (1) violated the Supremacy Clause of the United States Constitution, Article VI, Clause 2, by interfering with the relationship between the United States of America and its employees, (2) violated Section 3 of the Act for Admission of the State of California, 9 Stat. 452, by interfering with the primary disposition of public lands by the United States of America to its own employees for governmental purposes, (3) violated Section 102 of the California Revenue and Taxation Code by creating double taxation against governmental interests, in view of the "in lieu" payments received by defendant distributively from the United States of America under the provisions of Title 16 U.S.C. § 500, (4) violated the Supremacy Clause of the United States Constitution, Article VI, Clause 2, by creating double taxation against governmental interests and thus discriminating against the United States of America and the individual plaintiffs, by reason of Section 4654 of the California Public Resources Code, and (5) was excessive, arbitrary and discriminatory as to the valuation by reason of the term of ocupancy assessed, are all moot, and this Court makes no conclusions of law with regard to said issues.

Let judgment be entered accordingly.

DATED: May 14, 1973.

/s/ Ross A. Carkeet
ROSS A. CARKEET
Judge of the Superior Court

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Filed May 14, 1973

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TUOLUMNE

No. 11317

UNITED STATES OF AMERICA, in its own behalf, et al., PLAINTIFFS,

vs.

COUNTY OF TUOLUMNE, a political subdivision of the State of California, DEFENDANT.

JUDGMENT

This Court having heretofore made and entered its Findings of Fact and Conclusions of Law, which are filed concurrently herewith and incorporated herein by reference as though fully set forth herein, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs, and each of them, have and take judgment against defendant;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff C. W. Bates have and recover from defendant the sum of $78.37, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff J. Rusk, Jr., have and recover from defendant the sum of $91.31, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff J. R. Alvis have and recover from defendant the sum of $38.11, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff R. A. Gilkey have and recover from defendant the sum of $81.25, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff S. G. Mauk have and recover from defendant the sum of $91.31, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff T. W. Ralls have and recover from defendant the sum of $74.78, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff D. J. Schroedel have and recover from defendant the sum of $86.06, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff R. C. Hensley have and recover from defendant the sum of $65.93, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff C. G. Westrate have and recover from defendant the sum of $86.75, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff M. H. Holloway have and recover from defendant the sum of $35.30, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff J. R. Seils have and recover from defendant the sum of $58.99, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff R. K. Semmens have

and recover from defendant the sum of $17.35, plus interest thereon at the rate of 6% per annum from August 31, 1967;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each and all of the possessory interest assessments made and entered by defendant against each and all of the plaintiffs herein, except plaintiff United States of America, for the tax year 1967-1968, be, and the same are hereby, cancelled as void, illegal and of no effect.

DATED: May 14, 1973.

/s/ Ross A. Carkeet
Judge of the Superior Court

APPENDIX B

CERTIFIED FOR PUBLICATION

Filed August 13, 1975

IN THE COURT OF APPEAL
FIFTH APPELLATE DISTRICT
STATE OF CALIFORNIA

5 Civil No. 2055
(Sup. Ct. No. 136452)

UNITED STATES OF AMERICA, ET AL.,
PLAINTIFFS AND RESPONDENTS

v.

COUNTY OF FRESNO, DEFENDANT AND APPELLANT

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Blaine E. Pettitt, Judge. Reversed with directions.

Robert M. Wash, County Counsel, and James B. Waterman, Deputy County Counsel, for Defendant and Appellant.

Dwayne Keyes, United States Attorney, and Richard W. Nichols, Assistant United States Attorney, for Plaintiffs and Respondents.

Appellant is the County of Fresno, a political subdivision of the State of California. Respondents are the United States of America and 17 individuals employed by the United States in the Forest Service of

the Department of Agriculture; for convenience, we hereinafter will refer to the United States as the government and to the 17 employees as respondents.

Appellant appeals from a judgment of the Superior Court of Fresno County setting aside a decision of the Fresno County Board of Supervisors, sitting as the county board of equalization, upholdnig the possessory interest assessments made by the county assessor in connection with the government dwelling units respondents were occupying on the first Monday of March 1967 in parts of the Sequoia National Forest and the Sierra National Forest located in Fresno County. The superior court first determined that respondents, as a matter of law, had no possessory interest in the dwellings they occupied and that the assessments were void for that reason. Then the court determined that the tax violated both the supremacy clause of the United States Constitution and the Act, for the Admission of the State of California into the Union, contravened a federal "in lieu of taxes" statute and was discriminatory.

The court's determination that respondents did not own possessory interests in the government dwellings they occupied on the first Monday of March 1967 was error. In addition, the trial court's other rulings regarding the invalidity of the tax were erroneous. Accordingly, we reverse the judgment and remand the cause back to the lower court to determine whether the county assessor's valuations of the possessory interests were excessive; respondents also challenged the amount of the valuations placed upon

their possessory interests by the assessor but, for obvious reasons, this issue was not reached by the trial judge.

The basic facts are undisputed. On the first Monday of March 1967, respondents were living in Class A, B and C dwelling units maintained by the government in the Sequoia National Forest and the Sierra National Forest. Respondents were charged a rental for the use of the premises comparable to rentals charged in nearby communities for similar dwellings, after reasonable adjustment for inconveniences; the rental was deducted from respondents' bimonthly paychecks. Respondents also paid for all utilities.

Under guidelines promulgated by the forest service, an employee's occupancy of a dwelling unit could be required when it was necessary to have the employee available to serve the public or to protect natural resources or government property; in all other cases, an employee could reside in a government owned unit if one was available and if the employee so desired. The forest service could terminate the occupancy at any time or move the employee and his family from one unit to another so that a particular dwelling could be put to its most efficient and effective use. For example, during forest fires or other emergencies, the forest service could temporarily evict the employee and his family or it could move additional employees into the unit; the forest service could house two employees in the same residence for a substantial period of time; also, the forest service could require an unmarried employee to move out so a married employee and his family could be moved in.

Other examples of government control on the use of the dwelling units are as follows: The employee could not sublease or assign his "right" of occupancy; the front doors were equipped with locks which could be opened by a single master key; the employee could not make structural changes in the units; the employee's supervisor could enter the dwelling on official business relating to the unit, or if he suspected that damage was being done to the premises; government radios and communication equipment were kept inside some of the residences, and at times the equipment operated 24 hours a day; when official forest service facilities were closed, the public was encouraged to contact forest service employees at their dwelling units.

In this state the right to possess and use land or improvements, "except when coupled with ownership of the land or improvements in the same person", is treated as a possessory interest and is subject to taxation. (Cal. Const., art XIII, § 1; Rev. & Tax. Code, §§ 103, 107, 201; see *Kaiser Co.* v. *Reid*, 30 Cal.2d 610, 618; *Mattson* v. *County of Contra Costa*, 258 Cal.App.2d 205, 209.) Generally speaking, a possessory interest includes the right of a private individual or corporation to use government owned tax exempt land or improvements, and this right is considered a private interest taxable by the state and its taxing agencies. (*De Luz Homes, Inc.* v. *County of San Diego*, 45 Cal.2d 546, 562; *Kaiser Co.* v. *Reid*, *supra*, 30 Cal.2d 610, 618; *People* v. *Shearer*, 30 Cal. 645, 655-657.) But not all occupancies or uses of

tax exempt government owned lands or improvements by private individuals are taxable as possessory interests. To give rise to a taxable possessory interest, the right of possession or occupancy must be more than a naked possession or use; it must carry with it, either by express agreement or tacit understanding of the parties, the degree of *exclusiveness* necessary to give the occupier or user something more than a right in common with others, or, in the case of employment, something more than the means for performing his employer's purpose, so that it can be said, realistically, that the occupancy or use substantially subserves an independent, private interest of the user or occupier. (*Kaiser Co.* v. *Reid*, *supra*, 30 Cal.2d 610, 618-620; *Pacific Grove-Asilomar Operating Corp.* v. *County of Monterey*, 43 Cal.App.3d 675, 684, 693; *Sea-Land Service, Inc.* v. *County of Alameda*, 36 Cal.App.3d 837, 843; *Board of Supervisors* v. *Archer*, 18 Cal.App.3d 717, 726-727; *Mattson* v. *County of Contra Costa*, *supra*, 258 Cal.App. 2d 205, 209; *McCaslin* v. *DeCamp*, 248 Cal.App.2d 13, 17-19; see *Douglas Aircraft Co.* v. *Byram*, 57 Cal.App.2d 311, 317; cf. *San Francisco* v. *Anderson*, 103 Cal. 69, 70.).

It seems clear to us that respondents' right to occupy and use the dwellings in question subserved, primarily, an independent, private purpose and that respondents had taxable possessory interests in the government owned improvements. (See *Pacific Grove-Asilomar Operating Corp.* v. *County of Monterey*, *supra*, 43 Cal.App.3d 675, 693.) The units had bed-

rooms, bathroom, kitchens and living areas and in every way were residential in character;[1] until such time as the forest service purported to exercise its right to terminate the occupancy or to remove the employee and his family temporarily, respondents had the exclusive right to use the premises as homes for themselves and their families; while government business was sometimes conducted from the units, the business was completely incidental to the main use of the property, respondents were charged a rental for the use of the property; they paid for all of the utilities; and preference was given to married employees, evidencing the residential character of the occupancy.

Admittedly, the rights of possession involved in this case were nontransferable and were terminable at the will of the government. However, the fact that a possessory right is nontransferable (*Kaiser Co.* v. *Reid*, *supra*, 30 Cal.2d 610, 620; *Mattson* v. *County of Contra Costa*, *supra*, 258 Cal.App.2d 205, 211) or is revocable at the will of the government (*McCaslin* v. *DeCamp*, *supra*, 248 Cal.App.2d 13, 17; *Rand Corp.* v. *County of Los Angeles*, 241 Cal.App. 2d 585, 588; see *Board of Supervisors* v. *Archer*, *supra*, 18 Cal.App.3d 717, 725-726) or is a condition of employment (*McCaslin* v. *DeCamp*, *supra*, 248 Cal.App.2d 13, 17-18) or to some extent must be

[1] The Class A unit contained three or more bedrooms; the Class B unit was a two-bedroom home; the Class C unit had only one bedroom and was designed primarily for single persons.

shared with others (*Board of Supervisors* v. *Archer*, *supra*, 18 Cal.App.3d 717, 725-727) does not mean, per se, that there is no taxable possessory interest. These, as well as similar controls on the right of possession, are factors to be considered in fixing the value of the possessory interests. (*Sea-Land Service, Inc.* v. *County of Alameda*, *supra*, 36 Cal.App.3d 837, 841; *Board of Supervisors* v. *Archer*, *supra*, 18 Cal. App.3d 717, 725; *McCaslin* v. *DeCamp*, *supra*, 248 Cal.App.2d 13, 18.)

The same is true as to the other controls and restrictions imposed by the forest service on the use of the dwelling units, particularly where, as here, they were exercised sparingly; while the forest service had the power to terminate the occupancy at any time or to evict the employee and his family during periods of emergency, or to bring another employee to live in the residence with an occupant and his family, the record shows that it seldom did so; the employees' supervisor had a key to the lock on the front doors but he used it infrequently, and private locks could be installed with his consent; even though respondents were restricted from making structural changes in the units, similar restrictions are not uncommon in private tenancies.

We quickly dispose of the government's and respondents' arguments in support of the trial court's other rulings.

They insist that the assessments which were made by the assessor are in contravention of the supremacy clause of the United States Constitution. (U.S.

Const., art VI, cl. 2.) A possessory interest assessment is not made against the government or government property; the assessment is against the private citizen, and it is the private citizen's usufructuary interest in the government land and improvements alone that is being taxed. (*City of Detroit* v. *Murray Corp. of America*, 355 U.S. 489, 494-495 [78 S.Ct. 458, 461-462]; *United States* v. *Township of Muskegon*, 355 U.S. 484, 486-487 [78 S.Ct. 483, 485]; *United States* v. *City of Detroit*, 355 U.S. 466, 469-470 [78 S.Ct. 474, 476]; *General Dynamics Corp.* v. *County of L.A.*, 51 Cal.2d 59, 63.)

They argue that assessments would interfere with a governmental function because the forest service would have to revise its rent schedules and submit to county inquiries concerning "the various specific restrictions and aspects of the federal employer-employee relationship" and because the tax would create morale problems among the federal employees. Essentially similar arguments were disposed of by the United States Supreme Court in *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, 270-271 [63 S.Ct. 617, 621]. In that case the high court stated:

> "We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that . . . state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on the

> citizens of the United States within the state's borders, [citation]. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, [citation]." (See also, *Graves* v. *People of State of New York*, 306 U.S. 466, 487 [59 S.Ct. 595, 601-602].)

They allege that the assessments violate section 3 of the Act for the Admission of the State of California into the Union because they interfere ". . . with the primary disposition of the public lands of the United States to its own employees for governmental purposes." The term "primary disposal" as used in section 3 merely means the transmission or parting of title (*Oury* v. *Goodwin*, 3 Ariz. 255 [26 P. 376, 377]; *Topeka Commercial Security Co.* v. *McPherson*, 7 Okla. 332 [54 P. 489, 491]) or the ". . . disposal of lands by the United States by transfer through patent or deed executed by its officers under authority of Congress." (*State* v. *Holthusen*, 261 Minn. 536 [113 N.W.2d 180, 188]; see also *United States* v. *State of California*, 332 U.S. 19, 42 [67 S.Ct. 1658, 1671] (dissenting opinion of Justice Reed); *Christianson* v. *King County*, 239 U.S. 356 [36 S.Ct. 114, 117-118]; *Lux* v. *Haggin*, 69 Cal. 255, 336.)

They maintain that under section 500 of title 16 of the United States Code the county receives an in lieu tax for property located in national forests, and

hence the tax against respondents' possessory interests amounted to a double taxation. Payments made by the United States Government under section 500 of title 16 are not in lieu of taxes; there is nothing in the statute stating that the payments to the county are in lieu of taxes. The statute does not bar the imposition of taxes upon possessory interests, held by a private individual or corporation, in improvements located in national forests. (*Board of Supervisors* v. *Archer*, *supra*, 18 Cal.App.3d 717, 727; see also *International Paper Co.* v. *County of Siskiyou* (9th Cir.) 515 F.2d 285, 289; *Tree Farmers, Inc.* v. *Goeckner*, 86 Idaho 290 [385 P.2d 649, 651]; *Bartlett* v. *Collector of Revenue* (La. App.) 285 So.2d 346, 348; *Trinity Independent School Dist.* v. *Walker County* (Tex. Civ. App.) 287 S.W.2d 717, 722.)

They insist that the taxes involved in this case are discriminatory because under section 4654 of the Public Resources Code counties receive in lieu taxes in connection with possessory interests in state forests; respondents assume that because the counties receive in lieu taxes in connection with state forests they cannot assess possessory interests in federal lands and improvements located within national forests.

Section 4654 expressly provides that the in lieu tax shall be based only upon the value of the forest lands used for the purpose of continuous commercial forest production and not upon forest land used for any other purpose, including any improvements on such

land. Also, the fact that the state has elected to pay an in lieu tax in connection with state forests does not prevent the county assessor from taxing possessory interests in national forests in which the government has not elected to pay in lieu taxes in connection with those interests. (*International Paper Co.* v. *County of Siskiyou*, *supra* (9th Cir.) 515 F.2d 285, 288-289.)

The judgment is reversed, and the cause is remanded to the superior court to determine whether there was substantial evidence to support the board of supervisors' decision regarding the amount of the assessed values placed upon respondents' possessory interests. (See *Westlake Farms, Inc.* v. *County of Kings*, 39 Cal.App.3d 179, 183-185.)

/s/ Gargano, J.

We concur:

/s/ Brown, Geo. A., P.J.
/s/ Franson, J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
FIFTH APPELLATE DISTRICT
STATE OF CALIFORNIA

5 Civil No. 2124

(Sup. Ct. No. 11317)

Filed August 13, 1975

UNITED STATES OF AMERICA et al.,
PLAINTIFFS AND RESPONDENTS,

v.

COUNTY OF TUOLUMNE, DEFENDANT AND APPELLANT.

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. Ross A. Carkeet, Judge. Reversed with directions.

Stephen Dietrich, Jr., County Counsel, for Defendant and Appellant.

Dwayne Keyes, United States Attorney, and Richard W. Nichols, Assistant United States Attorney, for Plaintiffs and Respondents.

This is a companion to the case of *United States of America* v. *County of Fresno*, 5 Civil No. 2055, filed concurrently with this opinion. The only differences are that here the possessory interest assess-

ments were made by the County Assessor of Tuolumne County and that in reversing the Tuolumne County Board of Supervisors' decision upholding the assessment, the trial court merely held that the government employees did not have possessory interests in the dwellings they were occupying and using on the lien date.

Because it is conceded that the facts of this case are identical to the facts presented in the *United States of America* v. *County of Fresno* case, we reverse the judgment for the same reasons set forth in that opinion.

The judgment is reversed, and the cause is remanded to the superior court to determine whether there was substantial evidence to support the board of supervisors' decision regarding the amount of the assessed values placed upon respondents' possessory interests. (See *Westlake Farms, Inc.* v. *County of Kings*, 39 Cal.App.3d 179, 183-185.)

/s/ Gargano, J.

We concur:

/s/ Brown, Geo. A., P.J.

/s/ Franson, J.

APPENDIX C

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

5 Civil No. 2055
Superior Court 136452

UNITED STATES OF AMERICA, ET AL.,
PLAINTIFFS AND RESPONDENTS,

vs.

COUNTY OF FRESNO, DEFENDANT AND APPELLANT.

ON APPEAL FROM THE SUPERIOR COURT IN
AND FOR THE COUNTY OF FRESNO

REMITTITUR

The above-entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the —judgment— of the Superior Court in and for the County of Fresno in the above-entitled cause, be and the same is hereby reversed, and the cause is remanded to the superior court to determine whether there was substantial evidence to support the board of supervisors' decision regarding the amount of the assessed values placed upon respondents' possessory interests. (See *Westlake Farms, Inc.*

v. *County of Kings*, 39 Cal.App.3d 179, 183-185.) Appellant to recover costs on appeal.

I, KEVIN A. SWANSON, Clerk of the Court of Appeal of the State of California in and for the Fifth Appellate District, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 13th day of August, 1975, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 14th day of October, A.D. 1975

KEVIN A. SWANSON
Clerk

By /s/ Thelma Rhea
Deputy

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

5 Civil No. 2124

Superior Court No. 11317

On Appeal from the Superior Court in and for the County of Tuolumne

UNITED STATES OF AMERICA et al.,
PLAINTIFFS AND RESPONDENTS,

vs.

COUNTY OF TUOLUMNE, DEFENDANT AND APPELLANT.

REMITTITUR

The above-entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the —judgment— of the Superior Court in and for the County of Tuolumne in the above-entitled cause, be and the same is hereby reversed, and the cause is remanded to the superior court to determine whether there was substantial evidence to support the board of supervisors' decision regarding the amount of the assessed values placed upon respondents' possessory interests. (See *Westlake Farms,*

Inc. v. *County of Kings*, 39 Cal.App.3d 179, 183-185.) Appellant to recover costs on appeal.

I, KEVIN A. SWANSON, Clerk of the Court of Appeal of the State of California in and for the Fifth Appellate District, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 13th day of August, 1975, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 14th day of October, A.D. 1975

KEVIN A. SWANSON,
Clerk

By /s/ Thelma Rhea
Deputy

APPENDIX D

Order Due October 10, 1975

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

5th District, Division —, Civil No. 2055

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

Filed October 9, 1976

UNITED STATES OF AMERICA, ET AL.

v.

COUNTY OF FRESNO

Respondents' petition for hearing DENIED.

/s/ Sullivan
Acting Chief Justice

Order Due October 10, 1975

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

5th District, Division —, Civil No. 2124

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

Filed October 9, 1975

UNITED STATES OF AMERICA ET AL.

v.

COUNTY OF TUOLUMNE

Respondents' petition for hearing DENIED.

/s/ Sullivan
Acting Chief Justice

APPENDIX E

Filed January 6, 1976

DWAYNE KEYES
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Attorneys for Plaintiffs

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

---

5 Civil No. 2055

UNITED STATES OF AMERICA, ET AL.,
PLAINTIFFS-APPELLANTS

vs.

COUNTY OF FRESNO, DEFENDANT-APPELLEE

NOTICE OF APPEAL TO
UNITED STATES SUPREME COURT

To the Honorable Judges of the Above Entitled Court, and to Defendant-Appellee and Its Attorneys Robert M. Wash, County Counsel, and James B. Waterman, Deputy County Counsel:

PLEASE TAKE NOTICE that plaintiff United States of America and the individual named plain-

tiff employees Paul T. Meischke, Donald J. Cooley, Robert N. Thompson, Herbert J. Kendall, Charles Goughnour, Joel M. Criswell, Richard L. Nichols, William P. Cook, John R. Boswell, F. Weldon Sharp, Frank E. Crane, Robert Zwirtz, Paul Spivey, Thomas Adams, Jesse R. Luna, Lawrence L. Cabodi, and Harold F. Sebring, Jr., by and through their undersigned attorneys do hereby appeal to the United States Supreme Court from the decision of the Court of Appeal, Fifth Appellate District, State of California, dated August 13, 1975, in No. 5 Civil 2055, and from the judgment entered pursuant thereto on said date (See 50 Cal.App.3d 633), and from the Order of the Supreme Court of the State of California, dated October 9, 1975, denying plaintiffs' petition for hearing by said Court. This appeal is taken pursuant to the provisions of Title 28, United States Code. Section 1257(2).

DATED: January 5, 1976

DWAYNE KEYES
United States Attorney

By: /s/ Richard W. Nichols
RICHARD W. NICHOLS
Chief Assistant U.S.
Attorney

DWAYNE KEYES
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Telephone: (916) 440-2331
Attorneys for Plaintiffs Filed January 6, 1976

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

5 Civil No. 2124

UNITED STATES OF AMERICA, et al.,
PLAINTIFFS-APPELLANTS,

vs.

COUNTY OF TUOLUMNE, DEFENDANT-APPELLEE.

NOTICE OF APPEAL TO
UNITED STATES SUPREME COURT

To the Honorable Judges of the Above Entitled Court, and to Defendant-Appellee and its Attorney Stephen Dietrich, Jr., County Counsel:

PLEASE TAKE NOTICE that plaintiff United States of America and the individual named plaintiff employees C. W. Bates, J. Rusk, Jr., J. R. Alvis, R. A. Gilkey, S. G. Mauk, T. W. Ralls, D. J. Schroedel,

R. C. Hensley, C. G. Westrate, M. H. Holloway, J. R. Seils, and R. K. Semmens, by and through their undersigned attorneys, do hereby appeal to the United States Supreme Court from the decision of the Court of Appeal, Fifth Appellate District, State of California, dated August 13, 1975, in No. 5 Civil 2124, and from the judgment entered pursuant thereto on said date, and from the Order of the Supreme Court of the State of California, dated October 9, 1975, denying plaintiffs' petition for hearing by said Court. This appeal is taken pursuant to the provisions of Title 28, United States Code, Section 1257(2).

DATED: January 5, 1976

DWAYNE KEYES
United States Attorney

By: /s/ Richard W. Nichols
RICHARD W. NICHOLS
Chief Assistant U.S.
Attorney

APPENDIX F

DWAYNE KEYES
United States Attorney
RICHARD W. NICHOLS
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650 Capitol Mall, Room 2058
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Attorneys for Plaintiffs Filed: January 7, 1976

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE
COUNTY OF FRESNO

No. 136452

UNITED STATES OF AMERICA, et al.,
PLAINTIFFS-APPELLANTS

vs.

COUNTY OF FRESNO, DEFENDANT-APPELLEE

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

To the Honorable Judges of the Above Entitled Court, and to Defendant-Appellee and its Attorneys Robert M. Wash, County Counsel, and James B. Waterman, Deputy County Counsel:

PLEASE TAKE NOTICE that plaintiff United States of America and the individual named plaintiff employees Paul T. Meischke, Donald J. Cooley, Robert

N. Thompson, Herbert J. Kendall, Charles Goughnour, Joel M. Criswell, Richard L. Nichols, William P. Cook, John R. Boswell, F. Weldon Sharp, Frank E. Crane, Robert Zwirtz, Paul Spivey, Thomas Adams, Jesse R. Luna, Lawrence L. Cabodi, and Harold F. Sebring, Jr., by and through their undersigned attorneys do hereby appeal to the United States Supreme Court from the decision of the Court of Appeal, Fifth Appellate District, State of California, dated August 13, 1975, in No. 5 Civil 2055, and from the judgment entered pursuant thereto on said date (See 50 Cal.App.3d 633), and from the Order of the Supreme Court of the State of California, dated October 9, 1975, denying plaintiffs' petition for hearing by said Court. This appeal is taken pursuant to the provisions of Title 28, United States Code, Section 1257(2).

DATED: January 5, 1976

DWAYNE KEYES
United States Attorney

By: /s/ Richard W. Nichols
RICHARD W. NICHOLS
Chief Assistant U.S.
Attorney

DWAYNE KEYES
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RICHARD W. NICHOLS
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Telephone: (916) 440-2331
Attorneys for Plaintiffs Filed January 6, 1976

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE
COUNTY OF TUOLUMNE

No. 11317

UNITED STATES OF AMERICA, et al.,
PLAINTIFFS-APPELLANTS,

vs.

COUNTY OF TUOLUMNE, DEFENDANT-APPELLEE.

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

To the Honorable Judges of the Above Entitled Court, and to Defendant-Appellee and its Attorney Stephen Dietrich, Jr., County Counsel:

PLEASE TAKE NOTICE that plaintiff United States of America and the individual named plaintiff employees C. W. Bates, J. Rush, Jr., J. R. Alvis, R. A. Gilkey, S. G. Mauk, T. W. Ralls, D. J. Schroedel, R. C. Hensley, C. G. Westrate, M. H. Holloway, J.

R. Seils, and R. K. Semmens, by and through their undersigned attorneys, do hereby appeal to the United States Supreme Court from the decision of the Court of Appeal, Fifth Appellate District, State of California, dated August 13, 1975, in No. 5 Civil 2124, and from the judgment entered pursuant thereto on said date, and from the Order of the Supreme Court of the State of California, dated October 9, 1975, denying plaintiffs' petition for hearing by said Court. This appeal is taken pursuant to the provisions of Title 28, United States Code, Section 1257(2).

DATED: January 5, 1976

DWAYNE KEYES
United States Attorney

By: /s/ Richard W. Nichols
RICHARD W. NICHOLS
Chief Assistant U.S.
Attorney

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article VI of the Constitution provides in part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Section 13 of the Act of May 23, 1908, 35 Stat. 260, as amended, 16 U.S.C. 500, provides:

> *Payment and evaluation of receipts to State for schools and roads.*
>
> Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided*, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein. In sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by this section shall be based upon the stumpage value of the timber.

3. The Act of September 6, 1966, 80 Stat. 508, 5 U.S.C. 5911 provides:

> *Quarters and facilities; employees in the United States.*
>
> (a) For the purpose of this section—
>
> (1) "Government" means the Government of the United States;
>
> (2) "agency" means an Executive agency, but does not include the Tennessee Valley Authority;
>
> (3) "employee" means an employee of an agency;
>
> (4) "United States" means the several States, the District of Columbia, and the territories and possessions of the United States including the Commonwealth of Puerto Rico;
>
> (5) "quarters" means quarters owned or leased by the Government; and
>
> (6) "facilities" means household furniture and equipment, garage space, utilities, subsistence, and laundry service.
>
> (b) The head of an agency may provide, directly or by contract, an employee stationed in the United States with quarters and facilities, when conditions of employment or of availability of quarters warrant the action.
>
> (c) Rental rates for quarters provided for an employee under subsection (b) of this section or occupied on a rental basis by an employee or member of a uniformed service under any other provision of statute, and charges for facilities made available in connection with the occupancy

of the quarters, shall be based on the reasonable value of the quarters and facilities to the employee or member concerned, in the circumstances under which the quarters and facilities are provided, occupied, or made available. The amounts of the rates and charges shall be paid by, or deducted from the pay of, the employee or member of a uniformed service, or otherwise charged against him in accordance with law. The amounts of payroll deductions for the rates and charges shall remain in the applicable appropriation or fund. When payment of the rates and charges is made by other than payroll deductions, the amounts of payment shall be credited to the Government as provided by law.

(d) When, as an incidental service in support of a program of the Government, quarters and facilities are provided by appropriate authority of the Government to an individual other than an employee or member of a uniformed service, the rates and charges therefor shall be determined in accordance with this section. The amounts of payment of the rates and charges shall be credited to the government as provided by law.

(e) The head of an agency may not require an employee or member of a uniformed service to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise.

(f) The President may prescribe regulations governing the provision, occupancy, and availability of quarters and facilities, the determination of rates and charges therefor, and other related matters, necessary and appropriate to carry out this section. The head of each agency may prescribe regulations, not inconsistent with the regulations of the President, necessary and appropriate to carry out the functions of the agency head under this section.

(g) Subsection (c) of this section does not repeal or modify any provision of statute authorizing the provision of quarters or facilities, either without charge or at rates or charges specifically fixed by statute.

4. Sections 102-104, 107, and 201 of the California Revenue and Taxation Code, West's Ann. Calif. Code (1970) provide:

§ 102. *Double taxation forbidden*

Nothing in this division shall be construed to permit double taxation.

§ 103. *Property*

"Property" includes all matters and things, real, personal, and mixed, capable of private ownership.

§ 104. *Real estate or real property*

"Real estate" or "real property" includes:

(a) The possession of, claim to, ownership of, or right to the possession of land.

(b) All mines, minerals, and quarries in the land, all standing timber whether or not belonging to the owner of the land, and all rights and privileges appertaining thereto.

(c) Improvements.

§ 107. *Possessory interests; security for payment of taxes; seizure and sale for delinquent taxes; suit against assessee*

"Possessory interests" means the following"

(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

(b) Taxable improvements on tax-exempt land.

Except as provided in this section, possessory interests shall not be considered as sufficient security for the payment of any taxes. Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre, are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.

In the event of delinquency in the payment of any installment of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for the seizure and sale of possessory interests in Sections 2914 to 2919, inclusive, at any time within three years after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof.

§ 201. *Property taxable*

All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code.

5. Section 4654 of the California Public Resources Code, West's Ann. Calif. Code (1972) provides:

Payments to counties in amounts equivalent to taxes, expenditure of amounts paid

There shall be paid to each county in which lands acquired for state forest purposes are situated, out of funds hereafter made available for such purpose, an amount equivalent to taxes levied by the county on similar land similarly situated in the county in the same manner as provided in the Revenue and Taxation Code for secured property tax payments as long as the state continues to own the land. * * * Determination of what constitutes similar land similarly situated shall be made by a committee consisting of the county assessor of the county in which the land is located, a representative of the State Board of Equalization and a representative of the State Forester.

The money received by any county pursuant to this section may be expended by it for any proper state purpose not prohibited by the State Constitution.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 201679 212

Supreme Court, U. S.
FILED
JUL 16 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1262

UNITED STATES OF AMERICA, ET AL.,
Appellants

—v.—

COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL.,
Appellants

—v.—

COUNTY OF TUOLUMNE

ON APPEALS FROM THE CALIFORNIA COURT OF APPEAL,
FIFTH APPELLATE DISTRICT

FILED MARCH 5, 1976
PROBABLE JURISDICTION NOTED MAY 19, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1262

UNITED STATES OF AMERICA, ET AL.,
Appellants

—v.—

COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL.,
Appellants

—v.—

COUNTY OF TUOLUMNE

ON APPEALS FROM THE CALIFORNIA COURT OF APPEAL,
FIFTH APPELLATE DISTRICT

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RELEVANT DOCKET ENTRIES

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

CIVIL PROCEEDINGS

No. 136452

UNITED STATES OF AMERICA, ET AL., PLAINTIFFS

vs.

COUNTY OF FRESNO, DEFENDANT

Feb. 28, 1968 Filed Complaint & Issued Summons

* * * * *

May 15, 1968 Filed answer

* * * * *

Oct. 13, 1970 Filed interrogatories to deft.

Oct. 30, 1970 Filed answers to interrogatories by deft.

* * * * *

Sep. 30, 1971 Notice of P.T. Conf., Invitation, P/T 12/1/71 at 2:00 P.M.

* * * * *

Dec. 9, 1971 Filed pre-trial conf. order-trial set for 1-20-72

Dec. 16, 1971 Filed notice of filing pre-trial conf. order & decl of mailing

* * * * *

Feb. 28, 1972 Filed interrogatories to pltf.

* * * * *

Mar. 13, 1972 Filed answers to interrogatories by pltfs

May 18, 1972 Filed trans. of board of supervisors proceedings

May 18, 1972 Trial 1st DA no jury

May 19, 1972 Filed deps of Paul Conway

May 19, 1972 Trial 2nd DA no jury * * *

Nov. 2, 1972 Filed notice of intended decision

Nov. 2, 1972 Filed mem. of decision

Nov. 10, 1972 Filed request for findings

Nov. 10, 1972 Filed request for findings

Nov. 13, 1972 Min order—counsel for pltf prepare FF & CL

* * * * *

Dec. 12, 1972 Filed objection to proposed finding of facts

* * * * *

Jan. 8, 1973 Filed findings of fact and conclusions of law

Jan. 8, 1973 Entered and filed judgment

Jan. 9, 1973 Filed clerk's notice of entry of judgment

Mar. 7, 1973 Filed notice of appeal

Mar. 15, 1973 Filed notice to prepare trans.

Mar. 20, 1973 Filed notice to prepare additional trans.

* * * * *

Jun. 19, 1973 Filed receipt for trans

Apr. 9, 1975 Filed receipt for exhibits

May 8, 1975 Filed notice to transmit exhibits to Apellate Court

Oct. 16, 1975 Entered & Filed remittitur

Oct. 16, 1975 Filed opinion

Jan. 6, 1976 Received copy of notice of appeal to U.S.S.C.

Jan. 7, 1976 Filed notice of appeal

RELEVANT DOCKET ENTRIES

IN THE COURT OF APPEALS FIFTH APPELLATE DISTRICT STATE OF CALIFORNIA

5 Civil 2055
See Also 2124

[Caption Omitted]

Jun. 20, 1973 Filed record (CT & RT) on appeal from judgment

* * * * *

Oct. 24, 1973 Filed request for consolidation of the appeals

Oct. 24, 1973 Pursuant to request of plaintiff-respondent United States of America, and good cause appearing therefor, it is ordered that the two above-mentioned causes be consolidated on appeal for purpose of briefing

* * * * *

Apr. 8, 1975 Exhibits lodged pltfs' 1-6: deft's A-F

May 14, 1975 Cause argued and submitted

* * * * *

Aug. 13, 1975 Opinion: Reversed with directions. Gargano, J. [OP] We Concur: Brown (Geo. A.), P.J. and Franson, J.

Sep. 22, 1975 Received petition for hearing in Supreme Court

Sep. 22, 1975 Original record shipped to Supreme Court

* * * * *

Oct. 14, 1975 Filed copy of Supreme Court order *denying* hearing

Oct. 14, 1975 Remittitur to county clerk

Dec. 15, 1975 Original exhibits returned to county clerk

Jan. 6, 1976 Filed notice of appeal to U.S. Supreme Court

* * * *

[Attorneys' names omitted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF FRESNO

No. 136452

Filed February 28, 1968

UNITED STATES OF AMERICA, in its own behalf and on behalf of PAUL T. MEISCHKE, DONALD J. COOLEY, ROBERT N. THOMPSON, HERBERT J. KENDALL, CHARLES GOUGHNOUR, JOEL M. CRISWELL, RICHARD L. NICHOLS, WILLIAM P. COOK, JOHN R. BOSWELL, F. WELDON SHARP, FRANK E. CRANE, ROBERT ZWIRTZ, PAUL SPIVEY, THOMAS ADAMS, JESSE R. LUNA, LAWRENCE L. CABODI, and HAROLD F. SEBRING, JR., each suing in his own behalf, PLAINTIFFS

v.

COUNTY OF FRESNO, DEFENDANT

COMPLAINT
ACTION TO RECOVER TAXES

Plaintiffs by their attorney, John P. Hyland, United States Attorney for the Eastern District of California, allege that:

1. Plaintiff United States (hereinafter sometimes called Government) is a corporate sovereign and body politic.

2. At all times pertinent the individual plaintiffs herein were employed by the Government in the Forest Service of its Department of Agriculture and were assigned to duty stations in Fresno County in connection with the protection, maintenance and administration of the Sierra National Forest or the Sequoia National Forest.

3. Defendant is a political subdivision and body politic of the State of California.

4. The Government brings this action, at the request of its Department of Agriculture and under the direction of its Attorney General, in its own behalf and on behalf of the individual plaintiffs because of its interest as sovereign in vindicating its immunity under the Federal Constitution from state and local taxation and in protecting its employees from illegal assessments against them in contravention of rights derived from said immunity.

5. On the first Monday in March, 1967, and at all times pertinent thereafter, the Government owned in fee simple and was in actual possession of certain lands and dwellings in Fresno County which the Government, acting through its Forest Service, held, maintained and used as living quarters for its employees as provided by Congress in Title 5, United States Code, Section 5911.

6. On the aforesaid date, each of the individual plaintiffs had been assigned by the Government to, and was occupying, at the Government's pleasure, living quarters in such dwellings as an incident of, and in part compensation for, his employment.

7. Defendant's assessor, determining that each individual plaintiff had a possessory interest in the respective quarters occupied by him, assessed the purported possessory interests at the respective valuations and levied taxes against the individual plaintiffs in the respective amounts shown below:

Name of Employee	Assessed Value		Tax
	Land	Improvements	
Meischke, Paul T.	$30	$180	$10.63
Cooley, Donald J.	80	100	8.26
Thompson, Robert N.	30	210	11.01
Kendall, Herbert J.	30	180	10.63
Goughnour, Charles	30	120	6.88
Criswell, Joel M.	30	150	8.26
Nichols, Richard L.	30	180	10.63
Cook, William P.	10	130	7.09
Boswell, John R.	20	50	4.11
Sharp, Weldon F.	30	180	10.63

Name of Employee	Assessed Value: Land	Improvements	Tax
Crane, Frank E.	$30	$ 40	$ 3.54
Zwirtz, Robert	30	30	3.03
Spivey, Paul	20	70	6.32
Adams, Thomas	20	90	7.73
Luna, Jesse R.	20	70	6.32
Cabodi, Lawrence L.	20	90	7.73
Sebring, Harold F. Jr.	20	150	11.95

8. Pursuant to instructions from the Government, the individual plaintiffs paid the aforesaid taxes on August 31, 1967, under written protest.

9. On September 15, 1967, the Government and the individual plaintiffs filed an application for cancellation or reduction of said assessments and for refund of said taxes paid. Said application was heard before defendant's Board of Equalization on November 15, 1967, and denied.

10. Said protest and application were made, and this action is brought, upon the grounds that said taxes were erroneously and illegally assessed because, among other reasons

(a) No tax is provided for under California law since none of the individual plaintiffs had a taxable possessory interest in the quarters occupied by him; and

(b) The provisions of California law, if and insofar as they provide for said taxes, violate the Constitutions of the United States of America and the State of California because of infringement of the immunity of the United States from state and local taxation and infringement of the rights derived therefrom by the individual plaintiffs, each of whom occupied the quarters assigned to him as a servant of and in behalf of the United States; and

(c) Even if any of the individual plaintiffs had a taxable possessory interest, the assessment against him was excessive, erroneous and void:

(i) because it taxed a possessory interest different from the possessory interest which he had; and

(ii) because predicated on an excessive valuation of the possessory interest which, in fact, had no value.

11. This action is brought upon the further grounds that defendant's Board of Supervisors, sitting as the Board of Equalization, arbitrarily disregarded the evidence adduced at the hearing, in refusing to cancel or reduce said assessments and order refunds as prayed by plaintiffs, and, therefore, acted erroneously, illegally and fradulently.

WHEREFORE plaintiffs pray for judgment:

1. Canceling the assessments against the individual plaintiffs herein as illegal, void and of no effect; or
2. Reducing the assessments to valuations of zero in each instance, or to such valuations as the court determines to be equitable, should the court find that the individual plaintiffs have lawfully taxable possessory interests in the quarters which they occupy; and
3. Directing the refund, with interest as provided by law, of the taxes paid by plaintiffs, or such portion thereof as the court determines to have been improperly and illegally levied.

JOHN P. HYLAND
United States Attorney

By /s/ Richard Boulger
RICHARD BOULGER
Assistant United States Attorney
Attorney for Plaintiffs

VERIFICATION

Each of the undersigned declares under penalty of perjury that he has read the foregoing complaint and knows the contents thereof; that to his knowledge the same is true and correct and that this verification was subscribed by him

within the State of California at the place and on the date hereinafter set forth opposite his signature:

JOHN P. HYLAND
United States Attorney

By [signature]
RICHARD BOULGER
Assistant United States Attorney
Attorney for Plaintiffs

Individual Plaintiffs

Fresno, California Place	[signature] PAUL T. MEISCHKE
Trimmer Ranger Station Place	U.S. Forest Service, Trimmer Route Sanger, Calif. 93657 Address
2-21-68 Date	
Fresno California Place	[signature] DONALD J. COOLEY
Feb 22 1968 Date	7321 W. Hamilton Fresno Calif Address
Big Creek, Calif Place	[signature] ROBERT N. THOMPSON
2/21/68 Date	Box 38 Big Creek Calif 93605 Address
Trimmer Ranger Station Place	[signature] HERBERT J. KENDALL
2/21/68 Date	U.S.F.S. Trimmer Route Sanger, Calif. 93657 Address
Big Creek, Ca. Place	[signature] CHARLES GOUGHNOUR
2/21/68 Date	Box 91, Big Creek, Calif Address

Big Creek Ca Place	[signature] JOEL M. CRISWELL
2/21/68 Date	HC Box 38 Big Creek Calif 93605 Address
Trimmer Ranger Station Place	[signature] RICHARD L. NICHOLS
2/21/68 Date	Trimmer Route Sanger Calif Address
Trimmer Ranger Station Place	[signature] WILLIAM P. COOK
2/21/68 Date	U.S. Forest Service Trimmer R.S. Sanger Calif. Address
Auberry, Calif. Place	[signature] JOHN R. BUSKELL
2-21-68 Date	P.O. Box 53 Address
Trimmer Ranger Station Place	[signature] F. WELDON SHARP
2/21/68 Date	USFS Trimmer Route Sanger, Calif. 93657 Address
Trimmer Ranger Stn Place	[signature] FRANK E. CRAIG
2-21-68 Date	U.S. Forest Service Trimmer Route Sanger Calif Address

TRIMMER RANGER STATION		Robert Zwirtz
Place		ROBERT ZWIRTZ TRIMMER RT SANGER, CALIF
FEB. 21, 1968		93657
Date		Address
Pinehurst R.S.		Paul Spivey
Place		PAUL SPIVEY
2-23-68		Miramonte, Cal.
Date		Address
Pinehurst R.S.		Thomas Adams
Place		THOMAS ADAMS
2-23-68		Miramonte Calif
Date		Address
Pinehurst R.S.		Jesse R. Luna
Place		JESSE R. LUNA
2/23/68		Miramonte Calif
Date		Address
Pinehurst Calif		Lawrence L. Cabodi
Place		LAWRENCE L. CABODI
2-23-1968		Miramonte, Calif.
Date		Address
Pinehurst, Calif		Harold F. Sebring
Place		HAROLD F. SEBRING, JR.
2-23-1968		Miramonte Calif 93641
Date		Address

• • • •

[Attorneys' names omitted]

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

No. 136452

Filed May 15, 1968

• • • •

[Caption Omitted]

ANSWER

Now comes the defendant, the County of Fresno, and in answer to the complaint of the plaintiffs on file herein, admits, denies and alleges as follows:

I

In answer to Paragraphs 1, 2 and 3 of the plaintiffs' complaint, the defendant admits the allegations therein contained are true.

II

In answer to Paragraph 4 of the plaintiffs' complaint, the defendant has no information or belief sufficient to enable it to answer said paragraph, and basing its denial upon the lack of such information or belief, denies both generally and specifically, each and every, all and singular the material allegations therein contained.

III

In answer to Paragraph 5 of plaintiffs' complaint, the defendant denies that the government was in actual possession of the lands and dwellings in said paragraph referred to, but in this respect alleges that at all times pertinent hereto said land and dwellings therein referred

to were in actual possession of the employees of the government in said complaint named and were then and there being used by said employees as living quarters for themselves and their families.

IV

In answer to Paragraph 6 of plaintiffs' complaint, the defendant admits that the allegations therein contained are true.

V

In answer to Paragraph 7 of plaintiffs' complaint, the defendant admits the allegations therein contained are true.

VI

In answer to Paragraph 8 of plaintiffs' complaint, the defendant admits the plaintiffs paid the taxes therein referred to under written protest.

VII

In answer to Paragraph 9 of plaintiffs' complaint, the defendant admits the allegations therein contained are true.

VIII

In answer to Paragraph 10 of plaintiffs' complaint, the defendant admits the allegations therein contained are true, however, in this respect defendant affirmatively alleges that none of the grounds set forth in said protest and application or this action are valid or constitute legal grounds for the recovery of taxes paid and denies that said taxes were erroneously or illegally assessed for the reasons set forth in said paragraph or for any reason, and in this respect alleges that said taxes were legally and properly assessed and collected upon the possessory interest of the plaintiffs as set forth in Paragraph 7 of said complaint.

IX

In answer to Paragraph 11 of plaintiffs' complaint, the defendant denies that the Board of Supervisors sit-

ting as a Board of Equalization acted arbitrarily or disregarded the evidence adduced at the hearing, and in this respect specifically and affirmatively alleges that no substantial evidence was adduced at the hearing justifying the request to cancel or reduce said assessments or order refunds as prayed by plaintiffs and further denies that said board at said time or at any time, or at all, acted erroneously, illegally or fraudulently.

WHEREFORE, the defendant prays that neither the plaintiffs, or any of them, take anything by reason of their complaint on file herein and that said defendant be dismissed with its costs.

/s/ Robert M. Wash
ROBERT M. WASH
County Counsel of
Fresno County, California

/s/ Max E. Robinson
MAX E. ROBINSON
Deputy County Counsel

Attorneys for Defendant.

[PROOF OF SERVICE BY MAIL OMITTED]

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

No. 136452

Filed December 9, 1971

[Caption Omitted]

PRE-TRIAL CONFERENCE

The above entitled cause came on regularly for pre-trial conference on the 1st day of December, 1971.

Dwayne Keyes, United States Attorney by RICHARD W. NICHOLS, appeared as attorney for the plaintiffs.

Robert M. Wash, County Counsel, by JAMES B. WATERMAN, appeared as attorneys for defendants.

The services of an official Court Reporter were not required.

I. PARTIES TO ACTION

The cause is at issue between the plaintiffs, UNITED STATES OF AMERICA in its own behalf and in behalf of seventeen (17) plaintiffs named in the caption of the Complaint and this Pre-Trial Conference Order, and the defendant, the COUNTY OF FRESNO.

The above parties are the necessary parties and are properly before the Court, and the case is at issue and ready for trial.

II. NATURE OF CASE AND CONTENTIONS OF THE PARTIES

This is an action by plaintiff UNITED STATES OF AMERICA, on its own behalf and on behalf of some seventeen (17) employees of the United States Forest Service, seeking refund of certain moneys paid by them, under protest, pursuant to assessments of possessory interest taxes against them by the Assessor of the County

of Fresno. Plaintiff UNITED STATES OF AMERICA and the individual plaintiff employees contend that the assessments were illegal, erroneous, excessive and void.

III. MATTERS AGREED UPON OR ADMITTED

1. Plaintiff UNITED STATES OF AMERICA is a corporate sovereign and body politic.

2. At all pertinent times the individual plaintiffs were employed by the United States in the Forest Service of the Department of Agriculture, and were assigned to duty stations in Fresno County in connection with the protection, maintenance and administration of the Sierra National Forest or the Sequoia National Forest.

3. Defendant is a political subdivision and body politic of the State of California.

4. On the first Monday in March 1967, each of the individual plaintiffs had been assigned by the Government to, and was occupying, at the Government's pleasure, living quarters in certain dwellings owned by the Government, as an incident of, and in part compensation for, his employment.

5. Defendant's Assessor assessed against each of the individual plaintiffs possessory interests in the respective quarters occupied by said individual plaintiffs, and levied taxes against the individual plaintiffs based thereon, in the valuations and amounts set forth in paragraph 7 of plaintiff's complaint.

6. The individual plaintiffs paid said taxes on August 31, 1967, under written protest.

7. On September 15, 1967, the individual plaintiffs filed an application for cancellation or reduction of said assessments and for refund of said taxes paid. Said application was heard before defendant's Board of Supervisors, sitting as a Board of Equalization, on November 15, 1967, and was denied.

Additionally, by defendant's Answers to Interrogatories filed herein, the following facts are also admitted:

8. The term of possessory interest estimated by defendant's Assessor as being held by the individual plaintiffs was one year.

9. In assessing the various possessory interests against the individual plaintiffs, defendant's Assessor relied upon capitalization of income, using the imputed return approach, with a capitalization rate of 10%.

IV. ISSUES REMAINING IN DISPUTE

1. Whether the individual plaintiffs had possessory interests in the premises occupied by them, under California Revenue and Taxation Code Section 107, and if so, the nature of such interests.

2. Whether California Revenue and Taxation Code Section 107, insofar as it has been applied against the individual plaintiffs in this case, violates the Constitutions of the United States and of the State of California by infringing upon the immunity of the United States from state and local taxation by assessing possessory interest taxes against the Government's employees occupying, at the Government's pleasure, living quarters in dwellings owned by the Government.

3. Whether plaintiffs are entitled to a trial *de novo* on all issues tendered by plaintiffs' complaint, or whether any of said issues are required to be determined on the record presented at the November 15, 1967 hearing before defendant's Board of Supervisor, if an adequate record cannot be obtained.

4. Whether plaintiff is entitled to a trial de novo on the issues of:

(a) The existence of a possessory interest, and if one existed, the nature thereof, and
(b) The constitutionality of Revenue and Taxation Code Section 107 as applied to the individual plaintiffs.

V. RULINGS AND ORDERS OF THE COURT

1. Good cause appearing therefor, all discovery proceedings are left open, provided that they are completed no less than twenty (20) days before the date set for trial.

VI. SETTING FOR TRIAL

IT IS ORDERED that the cause be set for trial beginning on January 20, 1972, at 9:30 a.m., at the Courthouse, Fresno, California, in the Department of the Presiding Judge for assignment for trial; two (2) days being reserved for the trial. A jury is waived by both plaintiffs and defendants. Notice of trial is waived.

Dated: This 7 day of December, 1971.

/s/ [Illegible]
Judge of the Superior Court

* * * *

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

DEPARTMENT NO. 1 HON. BLAINE PETTITT, Judge.

[Caption Omitted]

REPORTER'S TRANSCRIPT ON APPEAL

May 18 & 19, 1972

APPEARANCES:

For the Plaintiffs:

RICHARD W. NICHOLS
Assistant United States Attorney
2058 Federal Building
650 Capitol Mall
Sacramento, California 95814

For the Defendant:

JAMES B. WATERMAN
Deputy County Counsel
Hall of Records
Fresno, California

* * * *

[COLLOQUY BETWEEN COURT AND COUNSEL]

[24] MR. NICHOLS: * * * Before I call my [25] witnesses, there are some matters in the pre-trial statement that I think, or the pre-trial order that should be taken care of.

One of them we call to your attention in Chambers on page four of the pre-trial order at line nine.

THE COURT: That's the one you did call to my attention.

MR. NICHOLS: Yes.

THE COURT: I did fill that in.

MR. NICHOLS: And the words, "of a possessory interest" should be after the word "existence."

THE COURT: Yes, I've already done that.

MR. NICHOLS: All right, on page two—

THE COURT: Just a moment. I can't seem to find that. Here it is. All right, page two.

MR. NICHOLS: Page two at line twenty-nine, I'll ask counsel if he has any objection to this, the words: "And in part compensation for."

I understand from my witnesses that it is their position that their occupancy is not in part compensation for their employment.

I would move to strike that from the matters admitted upon or agreed upon or admitted.

MR. WATERMAN: Well, I don't believe I can stipulate to that, your Honor. I think initially that language got in there because of a reference to it in Plaintiff's pre-trial statement. We did not have a pre-trial statement to offer and [26] it was admitted that this would go in at that time.

I don't know what the proof will be, but I don't think I could stipulate to have it stricken.

MR. NICHOLS: Well, this language came originally from the Complaint and I picked it up from the Complaint in my pre-trial statement and having discussed the matter with my witnesses, they tell me that insofar as they are concerned, it is not a fact and I would therefore make a motion to amend the pre-trial order by striking those five words.

MR. WATERMAN: Well, I would object to the motion, your Honor, because I think one of the issues that counsel has raised is that the fact that the government is charging a certain amount that represents the full cash value of the rental and our position is it does not.

And I think that this is part of our case, really. I didn't think there was any question about it, but now counsel is raising it. I had no prior knowledge that this was troublesome to him.

THE COURT: Well, if the Plaintiff contends that the rent charged is the fair rent, then there wouldn't be any benefit to the employee and it wouldn't be part of his compensation.

MR. WATERMAN: That's right.

THE COURT: Your contention is that it isn't a fair rent, therefore it is emollient or whatever you want to call it of the employment.

[27] MR. WATERMAN: Right.

THE COURT: And therefore it is in part compensation.

MR. WATERMAN: Right.

THE COURT: Really what we have, what the problem, we do have a problem then, don't we?

MR. WATERMAN: Yes.

THE COURT: It really should be an issue not agreed upon.

MR. WATERMAN: That's right.

MR. NICHOLS: Yes, I agree with that, your Honor. It is in the pre-trial statement as a matter agreed upon or admitted and I wish to remove it from that portion of the pre-trial order.

MR. WATERMAN: And add it.

MR. NICHOLS: And add it as a matter at issue.

MR. WATERMAN: I have no objection to that.

THE COURT: You don't?

MR. WATERMAN: No.

THE COURT: All right. Well, then that will be the order of the Court.

MR. NICHOLS: Then finally on page four at line five strike the word "and". It's simply a grammatical error I think.

MR. WATERMAN: Agreed.

THE COURT: Page four, line five. All right, there is no objection to that, is there?

[28] MR. WATERMAN: No.

THE COURT: All right, that will be stricken.

MR. NICHOLS: All right. Then at this time, your Honor, I would—I'm a little unclear as to the procedure, but I would request the Court to take judicial notice of the nine matters agreed upon or admitted as set forth in the pre-trial order so that they are in fact in evidence.

THE COURT: Of the nine matters agreed upon?

MR. NICHOLS: Yes, as set forth in the pre-trial order.

THE COURT: Well, it isn't necessary to do that, but your question is harmless as I see it.

MR. NICHOLS: Out of an abundance of caution, your Honor.

THE COURT: Well, that's right. Well, the parties are bound by the pre-trial order and these matters that are agreed upon stand the same as if proved.

MR. NICHOLS: Fine. Thank you, your Honor. At this time I would ask the Court to take judicial notice and move into evidence the provisions of Section 0.735-11, Subdivisions B, as in baker, and P, as in Paul, of Title 7 of the Code of Federal Regulations as it existed in 1967.

And I'll hand the Court a copy of those matters.

THE COURT: Very well. Thank you.

All right. On your representation the Court will take judicial notice of these regulations.

MR. NICHOLS: Thank you, your Honor.

MR. WATERMAN: Do you have any more to ask about, counsel?

[29] Rather than forget it in my case I wonder at this time if we could not also ask the Court to take judicial notice of those sections of the Forest Service Manual which were appended as exhibits to your answers to my interrogatories.

MR. NICHOLS: That's agreeable with me.

MR. WATERMAN: Is that fine?

MR. NICHOLS: Yes. And I do have copies as I looked at the Court's file—

THE COURT: I know what you're going to say and I'm glad to hear you say you have copies because I don't think I can read some of this. I just glanced at it.

MR. NICHOLS: I have additional copies which are a little more readable. I do have a set of originals that I can give to the Court. My problem in that regard is it is the only set I have and I have to do the same thing up in Tuolumne County, so I—

MR. WATERMAN: If you wouldn't object withdrawing them after yourself has had a chance to read them.

THE COURT: How soon will you need them?

MR. NICHOLS: Not until November.

THE COURT: Oh, I would have this decided hopefully by then.

MR. NICHOLS: Fine. Well, based on that, then, I'll hand to the Court first the original 1967 edition, or of the portion of the United States Forest Service Manual dealing with quarters rental. This is Section 6445 of the manual.

[30] THE COURT: That's—what was it, 6445?

MR. NICHOLS: 6445 of the manual.

THE COURT: 6445.

MR. NICHOLS: Also hand to the Court the Western Regional Supplement to the U.S. Forest Service Manual. And the explanation of that, the Western Region of the Forest Service constitutes for general purposes the west coast of the Forest Service as I understand it.

MR. FLYNN: I think it's an F-5 supplement.

MR. NICHOLS: Yes.

MR. FLYNN: Which doesn't include the whole western coast.

MR. NICHOLS: It includes—

MR. FLYNN: Mainly the State of California.

MR. NICHOLS: All right. It includes—does it include the entire State of California?

MR. FLYNN: Almost.

MR. NICHOLS: All right, it includes the area that these forests are involved in.

MR. FLYNN: Correct.

THE COURT: All right.

MR. WATERMAN: My pages are not numbered consecutively, but I assume what you're offering are those

copies that were appended to your answers to the interrogatories, is that correct?

MR. NICHOLS: Yes.

[31] MR. WATERMAN: Very well.

MR. NICHOLS: These are the originals of what those were taken from.

MR. WATERMAN: Because I notice in the first offer you made there also seems to be Title 6400 property management which I assume is a, on the basic section over which—

MR. NICHOLS: I didn't cut off the beginning of the first page or the end of the last page.

MR. WATERMAN: Very well.

THE COURT: Where I start is on 6445. It's on the back of the first page.

MR. NICHOLS: That's correct.

THE COURT: All right.

MR. NICHOLS: And then finally a copy of Circular No. A-45 from the Bureau of the Budget dated October 31, 1964.

THE COURT: Thank you.

MR. NICHOLS: Jim, at this time can we have a stipulation concerning a tax rate applied to the individual plaintiffs at this time?

MR. WATERMAN: Well, I don't know if this is the appropriate time, your Honor. I will, of course, leave it to the Court.

However, I think as to whether it becomes relevant depends on whether the Court gets to this particular problem. I don't know at this point that it would be appropriate to [32] at least agree to its being in evidence.

THE COURT: Well, the Court stated at the beginning that it appeared that we would be hearing the same evidence for the legal matters as we would for the factual matters but that there might be some exceptions.

MR. WATERMAN: This is right. However, the tax rate would only, I mean that's a fixed thing, where the assessment itself is the only thing that could vary.

The tax rate would remain the same and then that's just a mathematical formula to determine the actual

tax paid depending upon the assessment, so much per hundred dollars of assessed valuation.

So, I just—I don't see what relevancy there is in this point.

MR. NICHOLS: The relevancy is this: On the question of the term of occupancy, the taxes that were assessed were assessed on a one-year basis. We contend that the term that should have been assessed is a two-week basis.

The taxes, assuming that that contention is accepted by the Court, the Court can make a mathematical determination of what the taxes should have been simply by applying the tax rate together with the 22 percent assessed valuation rate which is admitted to the individual plaintiffs on the basis of the rent that they paid.

MR. WATERMAN: Well, if the Court's inclined to do that I don't think you even need to use the tax rate. You would [33] be talking about what, one/twenty-sixth of what was actually charged.

MR. NICHOLS: Well, that is one way of figuring it.

MR. WATERMAN: Yeah.

MR. NICHOLS: But that assumes that the Court rejects our actual rent argument.

MR. WATERMAN: All right. This is true because then it would have to be refigured.

MR. NICHOLS: It would have to be refigured; if the Court agrees with us we are entitled to have it figured on actual rent rather than imputed rent.

MR. WATERMAN: Well, I would have no objection to the figures going in—

THE COURT: I don't see how it could be harmful. It's almost something that the Court could take judicial notice of, I guess. I don't know whether it is or not.

MR. WATERMAN: Well, I think so, your Honor. The only objection I would have would be that I don't stipulate for all purposes or infer that the Court will ever use this, but—

THE COURT: That's right. I understand that.

MR. WATERMAN: Right.

MR. NICHOLS: I'm agreeable to your objecting to it on all grounds of materiality.

THE COURT: It could be subject to being stricken as I've already indicated I might do from time to time.

[34] MR. WATERMAN: Fine.

THE COURT: All right. Then let's get the rates.

MR. NICHOLS: I can read them off and you can cross-check me.

MR. WATERMAN: We have them here.

MR. NICHOLS: Oh, all right. Plaintiff Paul Meishke, 5.065 per hundred.

THE COURT: 5.065?

MR. NICHOLS: Dollars per hundred of assessed valuation. Plaintiff Donald J. Cooley, $4.59. Plaintiff Robert N. Thompson, $4.59; Plaintiff Herbert J. Kendall, five dollars—excuse me, 5.065; Plaintiff Charles Goughnour, $4.59.

THE COURT: Goughnour with a—

MR. NICHOLS: G-o-u-g-h-n-o-u-r.

THE COURT: And that was how much?

MR. NICHOLS: $4.59. Plaintiff Richard R. Nichols, no relation—

THE COURT: I wondered if you had a cabin up there that you were slipping in here. (Laughter)

MR. NICHOLS: —5.065; Plaintiff William P. Cook, 5.065; Plaintiff John R. Boswell, 5.0879; Plaintiff F. Weldon Sharp, 5.065; Plaintiff Frank E. Crane, 5.065; Plaintiff Robert Swartz, 5.065; Plaintiff Paul Spivey, 7.032, and all of the balance of the Plaintiffs are 7.032, Thomas Adams, Jesse R. Luna, Lawrence L. Cabodi and Harold F. Sebring, Jr.

At this time then, your Honor, the government will call [35] Mr. Mitchell.

THE COURT: Mr. Mitchell.

HAROLD LLOYD MITCHELL called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

Q Would you state your name, please?
A Harold Lloyd Mitchell.
Q And Mr. Mitchell, by whom are you employed?
A United States Forest Service.
Q In what capacity?
A At the present time, Deputy Forest Supervisor, San Bernadino National Forest.
Q And during the year 1967 by whom were you employed?
A United States Forest Service.
Q In what capacity?
A As Chief Branch of Work Load Analysis and Work Planning Division of Operation, Regional Foresters Headquarters.
THE COURT: Would you repeat that a little more slowly?
THE WITNESS: Yes. Chief branch of Work Planning and Work Load Analysis, Division of Operation, Regional Foresters Headquarters, 630 Sampson, San Francisco.
[36] Q BY MR. NICHOLS: Now, what were the duties and functions of that position at that time?
A Well, among other things I was responsible for the administration of the region's quarters rental program.
Q And your responsibility, can you be a little more specific as to what your responsibilities involved?
A Yes. Basically the overall review inspection and administration of all the quarters that the Forest Service has within the California region including the establishment of the basic rental rates for those structures.

• • • •

Q BY MR. NICHOLS: Mr. Mitchell, I think that you were just about to explain to us what your duties and functions in connection with your position as they relate to government quarters were.

A Yes. I thought I had explained that, but I will repeat the latter part of it.
[37] THE COURT: Now he did give his duties and he stated that his duties included responsibility for quarters, for the quarters rental program and actually establishing the rentals. I think that's where we broke.
Q BY MR. NICHOLS: Okay. Before I get into that specifically, let me jump to another subject.
Would you give us a chain of command so-to-speak within the Forest Service system both from your position up and from your position down?
A Yes. It would be easier to start this way. When I use the term service-wide I am including the entire United States including Alaska.
There are four administrative echelons in the Forest Service starting with the Chief of the Forest Service at the National level in Washington.
The Service is divided into nine regions, each of which is headed by a regional forester. That's the second echelon.
The third echelon is each region is divided into a number of National Forests, each of which is headed by a Forest Supervisor and in many cases a Deputy.
The fourth administrative echelon is the ranger district, each National Forest is divided into X number of ranger districts ranging from five to about thirteen, each of which is headed by a District Ranger now.
The four people I have mentioned, the Chief of the Forest Service, Regional Forester, Forest Supervisor and the [38] District Ranger are the only line officers in the organization and they each have complete and independent authority for the administration of their respective units.
Q Where did your position in 1967 fall in within this framework?
A I was in a staff capacity or I should say a substaff capacity to the Regional Forester in Region Five.
Q And was the work that you did and the decisions that you made done on your own authority or was it done on the authority of your Regional Forester?
A Under the authority of the Regional Forester.

Q All right. And as I understand his directions, which would be based within this framework on your work, would be directions to the Forest Supervisors of the various forests and then the Forest Supervisors would in turn give instructions to the District Rangers?

A Correct.

Q All right. Now, to get back to your role in setting rental rates in connection with the occupancy of government quarters, were you guided by any formal criteria in making those determinations?

A Yes.

Q And what were those criteria?

A Well, apparent document that all Federal agencies receive guidance from in establishing quarters rentals rate is Bureau of the Budget Circular A-45.

[39] Q And this is the document, one of the documents that I have previously handed to the Court, is it in evidence?

THE COURT: Do you want them in evidence?

MR. NICHOLS: Yes. I would like them in evidence with subsequent permission to withdraw and substitute copies.

THE COURT: All right, then is there any objection?

MR. WATERMAN: No objection, your Honor.

THE COURT: All right. The Bureau of the Budget Circular No. A-45 will be Plaintiff's One in evidence.

(Whereupon, Plaintiff's Exhibit No. 1, Circular No. A-45, was received into evidence.)

Q BY MR. NICHOLS: What other criteria did you rely on besides Circular A-45?

A The policies and procedures established by the Chief of the Forest Service in the Forest Service Manual, specifically Title 6440.

Q 6440 or 6445?

A Well, the title it is is 6440 and then it's broken down into sub-sections.

Q I see.

THE COURT: And this was called what?

THE WITNESS: It's, the Title 6440 is property management and sub-section 6445 is quarters rental, your Honor.

THE COURT: All right. Are you offering that as [40] Plaintiff's 2?

MR. NICHOLS: I'm offering that in evidence, your Honor.

MR. WATERMAN: No objection.

MR. NICHOLS: That is the service-wide manual or a portion of the service-wide manual.

THE WITNESS: That's right.

THE COURT: Exhibit so marked number two in evidence.

(Whereupon, Plaintiff's Exhibit No. 2, manual, was received into evidence.)

Q BY MR. NICHOLS: And finally did you have another document or criteria that you relied on?

A Yes, the third was the Regional Forester's Supplement to the parent text or to this section which expanded upon the controls this region would establish.

MR. NICHOLS: All right. I would move that into evidence as government's next in order, your Honor.

THE COURT: All right, this will be then—this bluish colored—

THE WITNESS: R-5 Supplement down at the bottom, R-5. Whatever number it is and the date.

THE COURT: All right, fine. Then R-5 Supplement No. 3 to the property management regulations will be Plaintiff's Exhibit 3.

(Whereupon, Plaintiff's Exhibit No. 3, R-5 Supplement, was received into evidence.)

[41] Q BY MR. NICHOLS: Now, each of these documents that we have just been discussing were documents that were in effect in 1967, is that correct?

A Yes.

Q And there may or may not have been changes since that time?

A Are you asking me if there were changes or just making a statement there may or may not be?

Q Do you know?

A There have been some changes.

MR. WATERMAN: I would object, your Honor. I don't know what relevancy changes subsequent to '67 would have.

THE COURT: Well, all right. I will sustain the objection. I think it was just a suggestion that that may not be what the law is today. But that isn't what we're dealing with.

We're dealing with '67.

MR. NICHOLS: That's correct, your Honor.

Q With regard to the R-5 Supplement, which you've told us was the Regional Supplement, was that Supplement created or determined by you or by someone else?

A I have to reach back a little bit. Most of what is stated in that particular Supplement No. 3 had been in effect prior to 1967 and was up-dated by myself at that time on completion of the quarters rental survey.

Q All right. And that acted as a supplement to what [42] was in the manual?

A Yes.

Q Now, will you tell the Court in summary what the procedure was in ascertaining—well, strike that. When Forest Service employees were assigned to government quarters they paid a rental, did they not?

A Yes.

Q And how was this rental paid?

A It's paid as part of a deduction from their paycheck bi-weekly.

Q All right. And how was the amount of that deduction determined, and I'm asking for procedure, not any specific case.

A Okay. Well, do you want me to start in with the private rental survey on how the base rates are established?

Q Right.

A Well, I'll try to capsulize this as briefly as I can. By direction of the Bureau of Budget, all Federal agencies are required to examine the rental rates for quarters every three years.

And in the Forest Service the effective date of the new rates is at March 1, or the pay period closest to that. The rates are adjusted in this manner. Sample survey areas are established by the Regional Forester. In this instance in Region Five it encompasses the entire state of California. Through a statistical sampling procedure selected communities [43] are established and the Board of Supervisors are directed to make a private rental survey of comparable private rentals in these communities.

Now, by comparable I mean the residence should be of comparable quality and size including the number of bedrooms, whether or not they have a carport or a garage, et cetera. Also including the amenities such as street lights, paved streets, police and fire protection, et cetera.

When this data is gathered, it is analyzed at the Regional level and at this point in time I did this for the entire region. And the rates then are established on the basis of this input on a region-wide average for the particular classes of residents that we have. And basically there are three.

There's a Class A dwelling, which is a three bedroom home with a modern conveniences; a Class B, which is a two bedroom home, and a Class C, which is a one bedroom home.

We also have barracks type facilities and portable facilities such as house trailers.

Q All right. The base rate, you would establish a base rate, is that correct?

A Right.

Q And that base rate would be based upon what?

A Upon an average of the private rental samples region-wide.

[44] Q And—

A For comparable housing.

Q And after you had established this base rate, would there be any adjustments made to it?

A Yes.

Q Now, before we get into the adjustments, the base rate was required by law to be established on a fair rental value basis, was it not?

A Yes.

Q All right. Now, what are the types of adjustments that you would make to the base rate?

A Well, basically there are two. The first is called an accessibility adjustment and this is simply an adjustment made based upon the distance of the, within the government house and the closest established community.

Now, by established community this, these communities actually have to meet the criteria set forth in Circular A-45 by the Bureau of the Budget. Not every community is an established community is what I'm trying to say.

The second adjustment is in connection with the lack of or completeness of the fifteen amenities which are also described in Circular A-45.

Q All right. May I have A-45 your Honor? That's the white one.

Would you tell us what you're talking about in connection with the fifteen amenities?

[45] A Yes. On page three of Circular A-45—do you want me to just read them?

Q Yes, if you would, please.

A Paved streets, street lighting at least at intersections, sidewalks, lawns, trees and landscaping, general attractiveness of the neighborhood, community sanitation services, reliability and adequacy of water safe for household use, reliability of adequacy of electrical service, reliability and adequacy of telephone service, reliability and adequacy of fuel for heating, hot water and cooking, police protection, fire protection, unusual design features of a dwelling, absence of disturbing noises or offensive odors and standards of maintenance.

Q All right. Now, you have told us about the fact that surveys were made on the basis of or from specified sample communities. If I may have this one, your Honor?

THE COURT: Sure.

Q BY MR. NICHOLS: I'll refer you to Plaintiff's Exhibit 3, the Western Regional or the Regional R-5

Supplement and ask you with respect to Sierra National Forest and Sequoia National Forest what those communities were.

A For the Sierra Forest the communities are Clovis, Fresno, Madera, Mariposa and Sanger. For the Sequoia Forest the communities are Bakersfield, Exeter, Kernville, Porterville and Sanger.

[46] Q All right. Now, why were those particular communities established as the sample communities?

A Well, I can't tell you precisely. I can give you several reasons. I don't know all of the reasons.

Q Please.

A One is that these communities are in effect adjacent or immediately adjacent to the National Forest where our dwellings are located.

They may be sixty miles away in some cases, but they are the closest representative communities that meet the established criteria set forth by the Bureau of the Budget.

And, number two, we did not select all communities that meet the criteria because statistically it was not necessary in order to come up with valid data on the number of cases that we actually sampled.

It could be supported statistically to come up with a base rate.

Q In connection with the occupancy by the employees of specified government quarters, would there be any written documentation, lease agreement or a rental agreement or anything of that nature between the employee and the Forest Service?

A No, there is no document.

Q In some cases the government, the Forest Service has its own quarters which it assigns its employees to.

Does the Forest Service ever itself lease private [47] quarters for assignment to its employees?

A Yes.

Q All right. In that connection, in the situation where the Forest Service leases private quarters for assignment to its employees, does the rental charged by the—well, strike that.

Is that lease agreement a lease agreement between the employee and the owner of the property?

A No, it is not.

Q Or between the Forest Service and the owner of the property?

A It's between the Forest Service and the owner of the property.

Q And the—is the amount of the lease agreement, the rental payable under the lease agreement, the amount that is charged to the employee necessarily?

A No, it is not the same. In fact, rarely, if ever, will they coincide.

Q Why is this?

A Well, normally the—and this is kind of the exception to the rule because we don't lease a great number of private dwellings, but where we do the lease fee is often times somewhat higher than the rates that have been established by the Regional Forester and by direction, either by the Bureau of the Budget or the Chief of the Forest Service we have no authorization to charge more than the basic rental [48] rates that are established.

In other words, if I can give you an example, the Forest Service could enter into a lease agreement with a private party for a residence. The monthly lease could amount to as much as $250.00 a month. The basic rental rates that are established for that class of dwelling would be something more nearly approximating $120.00 a month, depending upon a distance from an established community. All the criteria applies.

Q Why should there be such a difference if the base rate is supposed to be established on the basis of fair rental value?

A I suppose there are many answers to that and I really can't think of one off my head. Part of it is just the dwelling itself, the condition of the dwelling, the type of dwelling, the amount that the, it would be the lessor wants for that particular dwelling under say a one-year or a five-year lease.

Q Well, are these leased quarters generally located in accessible areas?

A The few that I am familiar with have been located in or adjacent to small communities, accessible areas to be specific.

Q Why would the Forest Service lease private quarters rather than getting into its own quarters?

A There could be several reasons, one of which there [49] are not the number of dwellings needed for administration of that particular district.

In other words, four residences may be required for the District Ranger and his staff and only three are available. Another one is needed. And so the Forest Service will enter into a lease agreement to provide the fourth residence.

There is another reason also and that is that most of these are not located, in fact none of the residences are located on National Forest land and often times they are somewhat removed from the nearest National Forest land.

Therefore, we have no authority to build a residence, for example, on private land outside the forest. Congress does not give us that authority.

Q All right. Then as I understand you, the relationship between the Forest Service and the private party is not the same as the relationship between the Forest Service and its employee in connection with the rental of facilities?

A That's right.

THE COURT: Is there ever a situation where the Forest Service pays less rent to a private party than it charges the employee?

THE WITNESS: Not to my knowledge, your Honor, but it is conceivable. You see it works both ways. The base rate is established and if it's a standard three bedroom home, for example, and the adjustments are made, the accessibility adjustment, and the adjustment for amenities, even though the [50] government might be paying less for that than what the actual computed rate is, we have no authority to reduce that rate on that basis.

The employee is still charged the rate that is determined by the Regional Forester with adjustments. So, it works both ways.

Q BY MR. NICHOLS: Why in that type of a situation would not the employee simply rent directly from the property owner?

A This is what normally happens. In fact, like I don't know a single incidence where this has occurred because if it were in fact this situation we would encourage the employee to go rent it direct.

Now there is one exception to that or one reason why that could not come about in that the lessor sometimes is only interested in a long-term arrangement, five years or ten years.

There is absolutely no guarantee on the part of an employee that wanted to ever enter into a separate lease arrangement with the lessor that he would be there for any given period of time.

He does not have that kind of control over his movements. The Forest Service could transfer him out, could make an offer to him he could accept two months after he moves in so he can't make an ironclad agreement that he will be there for five years. Did I confuse you?

[51] THE COURT: No. I understand that.

Q BY MR. NICHOLS: This is a reason for the difference in rental rates between or this is a reason for the difference in rental rates between what the Forest Service may pay in leasing and what is may charge its own employees?

A Yes.

THE COURT: Does the Forest Service necessarily rent from a private owner a dwelling that is of the same standard that the government housing would be?

In other words, might the Forest Service have to lease a nicer home than it would have supplied if it had one available?

THE WITNESS: Well, the answer to that is, your Honor, no, we attempt to find comparable housing. In fact, in complying with the Bureau of the Budget direction we really have no authority to go out and lease a higher quality dwelling than we ourselves provide.

But, they're coming up with a dwelling which is exactly the same as, say, a three bedroom home on National Forest land that was maybe built thirty years ago is terribly difficult. You never can do that. You come as close as you can to the type of dwelling which will satisfy the employee's needs. And maybe I could be more specific.

For example, the Forest Service would not go out and lease a five bedroom home where the best that we have is a three bedroom, unless there were no other alternative.

* * * *

[53] MR. NICHOLS: Your Honor, before I get back with Mr. Mitchell, I think Mr. Waterman and I do have one additional stipulation. This is on the same point as the tax rate that we stipulated to previously and that is that the assessment rate for 1967 was 22 percent.

MR. WATERMAN: Insofar as it might become relevant, your Honor—

THE COURT: Very well.

Q BY MR. NICHOLS: All right. Mr. Mitchell, are there—is there any particular criteria involved in connection with the assignment of Forest Service employees to quarters?

A Well, there are some guidelines.

MR. NICHOLS: All right. May I have, your Honor—I guess you have the supplement—may I have the manual?

(Whereupon, Exhibit No. 2 was handed to the witness.)

Q All right. Would you refer—I've just handed you the, a copy of the manual, the Forest Service Manual.

Would you refer to Section 6445.03-2 and -3. Now, there is mention made there of two different types of occupancy, permissive occupancy and required occupancy.

Now, with regard to required occupancy, what are the bases upon which occupancy may be required?

A Well, in the main there are three conditions. [54] One would be service to the public. Two would be a protection of natural resources. Three would be for the

operation of specialized equipment and/or machinery in connection with a specific operation, for example a nursery.

Now there is a fourth one that also is used occasionally and that is for the protection of government property.

Q Is there any correlation between the type of job that a given employee may have and whether or not he will be required to occupy government quarters?

A Yes, usually there is.

Q And what—would you explain what that correlation is?

A Well, normally required occupancy or historically in this region has been associated with the protection of natural resources and more specifically related to our fire control personnel who are required to be at a station like twenty-four hours a day to respond to what we call the initial attack fire calls that come in, any time during this period. Did I make myself clear?

Q Yes. Are there any—you've given us an example of fire control people who have required occupancy.

Are there any other positions that you think of offhand who normally are required to occupy specified facilities?

A Yes. I cited an examlpe of a nursery. For example, a nursery operation requires not only the custody of [55] expensive and sophisticated equipment, but also requires a constant attendance of a personnel to control the sensitive temperature ranges in the nursery that have to be maintained and we do have nurserymen that are assigned in these positions that are required to occupy quarters.

Q Is there any correlation between the length of time that a person who is required to occupy quarters remains in those quarters and the length of time that a permissive occupancy employee remains in the quarters?

A I'm not sure I clearly understand that question.

Q All right. Is there—do fire fighters or nurserymen who I take it generally are required occupancy types tend to stay in government owned facilities for longer periods of time than say perhaps district rangers who are not required to occupy government quarters?

A Yes.

Q And what is the reason for this?

A Well, basically we have what we call our professional employees and then we have our technical employees. And another term that we kind of dislike but use is non-professional.

Now, in the main our technical people, most of our fire control people are technical people. They are technicians, highly qualified people skilled in wildlife and fire suppression. Many of these people are only seasonal, also. But because they are technicians, they are not subject to [56] move on up the echelon so-to-speak in the organization quite as rapidly.

In fact, there are some specific ceilings in how far they can go as a technician as opposed to our professional employees where per se there isn't, there are no constraints. It depends upon the man's ability, his capabilities, his skill, his background, his education.

He can go on the ladder either vertically or horizontally between the various functions and activities. Does that make sense?

MR. NICHOLS: I think it does.

THE COURT: Well, yes, I understand that all right. And then this difference then would have an effect upon how long the technician might remain in required housing?

THE WITNESS: Yes, your Honor. I guess I could say maybe more specifically this that in general or technicians, because of their ability to progress more rapidly than professional people, are prone to stay in place much longer than our professional people like our district rangers.

Q BY MR. NICHOLS: Did you say technicians advance more rapidly?

A Less rapidly.

Q All right. And—

A If I said more, I meant less.

Q And by reason of advancing less rapidly they stay in one place longer?

[57] A Yes. It's not uncommon to have, say, a fire control officer on a district who is a highly specialized person in a relatively high grade life in a government

dwelling for as long as fifteen or more years, and during that period of time there may be as many as four or five or half a dozen district rangers on the same district who he reports to, the distinction being that he's a technician as opposed to the district ranger who is a professional employee and goes on up the ladder.

Q Now, would you refer to the R-5 Supplement, the Regional Supplement and note, tell the Court specifically what the guidelines are there with regard to when occupancy may be required.

A If it's acceptable I will just quote from the directive here in the Region Five Supplement under required occupancy. "Forest Supervisors are authorized to require specific employees to occupy government quarters in accordance with Forest Service Manual 6445.03. Requiring an employee to live in a government dwelling at a certain location shall be done only when there is no other way to acquire a specific service or that government property cannot be adequately protected. Supervisors will determine these requirements on a case by case basis in conformance with the Washington Office policy. Employees will receive written notification of such a requirement."

Q All right. Now, once a determination has been [58] made to assign a particular employee to a particular quarters, whether or not the assignment is required or permissive, is there any difference in the relationship of the employee to the Forest Service based on whether the occupancy is required or permissive?

In other words, does a required occupant have more or less rights vis-a-vis the Forest Service than a permissive occupant?

A No.

Q What is the general principle by which assignments to government quarters are made?

A I'm searching for the word that we use there but in essence has to do with the highest use of the dwelling.

Q The most efficient use?

A Well, you might say most efficient or most effective. An example would be where there are two people competing for a residence there, one is a family man, a wife and children, the other is single, in all cases the decision will be made in favor of the family.

It's better use of a dwelling, more efficient, more effective use, more responsive to our employees needs than is the single occupant.

Q All right. Now, what does this mean in practice with regard, for example, to a bachelor who is occupying a two bedroom facility and a, let's say, a professional type moves into the area with a family? What would be the [59] result in that type of a situation?

A Well, it could be one of several actions taken and I should point out that often times there is no distinction made between a professional and a technician type employee where housing is concerned.

In your example you assume a technician with a family moved in, the dwelling was occupied by a bachelor, the district ranger has the authority to move that single occupant out of that dwelling and to assign it to the family because it is a higher need or a higher use of a dwelling or the Forest Supervisor has that authority.

Now, this doesn't always happen because there are a lot of other circumstances that may have to be considered, too.

Q Such as?

A Such as the tenure of the employee that's in the building there, how long he's been on the district, what his position is. I can't think of others right now.

Q Well, would you say that any one of these factors is more significant than any of the others?

A If I were going to pinpoint one that were more significant than the others, I would have to say it would probably be based upon the man's position, you know, if he's a staff assistant to the district ranger, even though he is a bachelor, that would take precedence over, say, somebody lower down in the echelon there. But it pretty much relates [60] to established use, too, you see.

Q All right. Now, what do you mean by established use? What role does it play?

A Well, if, for example, historically this particular dwelling has been earmarked, quotes, "for a district fire

control officer," and it so happens that this point in time it is occupied by a single fire control officer, then this is what I mean by established use.

The ranger still has the authority to move that FCO out of there and give it to the family and the supervisor does, too. However, this does not normally happen because of problems that are generated when that family moves on or particularly when the fire control officer moves on and a new fire control officer comes in who happens to be married, then you have a situation there that is rather difficult to resolve because in fact the house has been historically reserved and used by the first control officer.

If you move him out of there even though he's single you've automatically generated a problem at some future time for yourself.

Q Do you ever run into a situation where you have multiple employees serving the same function, for example, multiple fire control officers?

A More than one fire control officer?

Q Right.

A Well, to be specific or to be precise, I should say, [61] each district ranger has a fire control officer. Now that fire control officer on some of the heavier work load districts will have an assistant fire control officer and they will have a fire prevention officer and a whole staff underneath those people. So I'm not sure I'm responding.

Q Well, do—the essence I'm getting from your testimony is that the position of the employee is more important or more significant in connection with the assignment to a particular quarter than is the size of the family. Now, is that as a generalization correct?

A Yes.

Q All right. If that is correct what does the quote, "best use" principle mean in actual practice?

A In general it means if you have two employees, one married and one unmarried, competing for the same residence, everything being equal in status, stature, grade, et cetera, the house will be assigned to the person with the family.

Q Okay. Now, when there are assignments or reassignments, is there any notice requirement when you're moving one person out and another person in?

A There's no notice required and in effect none given except a verbal notice.

Q All right. Once a given employee has been assigned to a specified quarter, what are his rights with regard to that quarters, vis-a-vis, either the district ranger or the [62] Forest Service or the forest supervisor?

A I'm not exactly sure what you mean by rights.

Q Well, let's say—

A For example.

Q Well, go ahead.

A I was going to say, for example, is it his home in essence? He can treat it as his home. But he does not have the authority to exclude his superior or the forest supervisor as it were from official business having to do with that dwelling.

In other words, the district ranger or the forest supervisor can come in at any time and it's usually a reasonable time, obviously we wouldn't want to come in the middle of the night and make an inspection. But they have the authority to do this and the employee cannot deny it. Is that what you're asking?

Q That's what I'm getting at, right. And is this true all the way down the chain of command?

A I'm not sure of what you mean by all the way down the chain of command.

Q You told me the forest supervisor is higher than the district ranger. I take it from what you said the forest supervisor can come in with official business to the district ranger, is that correct?

A Right.

Q And the district ranger, I take it, can come into [63] the fire control officer's quarters?

A Right.

Q Now, does that same reasoning apply to the fire control officer going into the quarters of his subordinates?

A Yes, if it's on an official capacity and on official business. The same is true of the others. They can

come down, of the higher echelon they can come down and go in with business.

Q What maintenance ability does an employee have once assigned to specified quarters?

A In general very minimal. In fact they are more restrictive than what you might imagine. He is responsible basically for mowing the lawns and pruning the shrubs and replacing the light bulbs and cleaning out the flues and shoveling the snow, the routine type of maintenance you would normally have in just a housekeeping situation there.

He does not have the authority to make any modifications, alterations or any extensive revisions of that structure inside or out.

Q What if his wife doesn't like the color of the kitchen, can he repaint it a different color?

A No, he cannot. He can request that it be painted and his wife might like a particular color, but the administration still desides what color it's painted. It may not agree on what the wife wants.

Q If the wife doesn't agree, it's too bad for the wife?

[64] A She can always move out. That sounds like a typical bureautic approach, don't it?

(Laughter)

Q Let's assume that an employee has a two bedroom quarters and let's say he has a number of children and he wants to add on a bedroom and let's assume further that this is agreeable with his superiors and they authorize him to do it. And he in fact does add a third bedroom at his own expense.

Now, what does this do with regard, one, to the status of those quarters, and two, with regard to the rent that he pays for those quarters?

A Well, number one, it changes the classification of the dwelling automatically from a two to a three bedroom residence or from a Class B to a Class A dwelling.

And, number two, his rate, rental rate is increased proportionally. In other words, he goes from a Class B rent to a Class A rent, which is higher.

Q Even though he made all the improvements himself at his own expense?

A That's beside the point. But in answer to your question, yes, even though he did it himself.

Q All right. Now, what are the various types of facilities that are available for assignment of Forest Service employees?

A Types of dwellings you're talking about?

[65] Q Types of quarters.

A Quarters, dwellings, okay. There's the one and two and three bedroom family residences. There are house trailers varying in size. There are bare type facilities and at one time we even had a significant number of tent camps, but in general there were no quarters charged for those.

Q And assignments are made, in 1967 were made to any and all of these types of facilities?

A Yes, they still are.

Q Does the individual employee have a choice of facilities to which he will be assigned?

A No, he does not.

Q Who decides whether an employee is going to occupy a particular facility and what facility he's going to occupy?

A Normally it's the district ranger.

Q And—strike that. When these assignments are made, is it anticipated that there will be necessarily a sharing of those facilities in the event of necessity for such a sharing?

A I would have to qualify my answer to that to this extent: It depends somewhat upon the type of housing facility you're talking about. And I'd also have to say that it's always a possibility, and sometimes in an emergency actually exercised.

Now, in connection with the type of facility, it's [66] almost automatic that the quarter is occupied by a crewman, for example, on a fire crew is shared with other crewmen because it's a barracks type facility. That's an automatic situation there.

Occasionally in the past we have had when in an emergency and this could be either fire or flood, in fact it

has been both, where we have had to displace the employee temporarily or actually have to move someone in with him during this emergency situation.

But, it's for a short duration. It's not a permanent situation.

Q Well, does this happen as a practical matter as frequently as fires happen?

MR. WATERMAN: Excuse me, I was going to object. To me the question is vague. We don't know how often fires happen and I don't think there is any reasonable relationship.

MR. NICHOLS: Well, I'll withdraw the question.

THE COURT: All right.

Q BY MR. NICHOLS: Is there any correlation between the moving of people in and out of facilities and the occurrence of forest fires?

A Yes, it's normally under this situation that this happens.

Q Does the employee have any right to sublease the quarters that he is assigned to?

[67] A No, he does not.

Q What type of locks are these quarters fittted with?

A All government quarters are required to have a standard Forest Service lock. And in that connection every Forest Service employee, and I should say every permanent Forest Service employee has a Forest Service key in addition to many of our seasonal employees.

Q One key fits any Forest Service lock?

A Yes, its' a standard key. It fits any Forest Service lock.

Q All right. And is it—do people other than Forest Service employees acquire these keys?

A Yes, under a number of different circumstances.

Q Such as?

A Oh, it's not a frequent occurrence, but occasionally we'll have a cooperator or a permittee that will have to get through or have access to National Forest property and he needs a Forest Service key in order to gain entrance.

Like anything else, there is nothing to prevent one of our people, and particularly in the seasonal vein there

whether it's just one year, be issued a Forest Service key which gives him access to all kinds of valuable property and equipment and maybe the man is fired. He has to turn in that property before he receives his final paycheck; by property I mean the key as well as his badge and anything else he has.

[68] Now, there is nothing to prevent him from going down to the closest outfit that makes keys and having a duplicate made and this has been done in the past and therefore he's got an automatic pass key to any of our locks. It's just that simple.

Q Well, are the Forest Service locks on quarters the same as they are on any other place where a Forest Service lock might be used, for example on a gate?

A Yeah. They're identical. We have a Forest Service padlock and we actually have a door lock like you have on your home on your front door. The same key opens both.

Q So somebody might be a cooperator might be given a key to operate a gate and would automatically have a key to any Forest Service quarter, is that correct?

A That's right. We're even required to go one step further, for example, no offices that we lease from or through GSA or directly with a lessor, like say a district ranger's office, it's not built on National Forest land. It's built on private land. We are required to have a Forest Service lock on one of the doors entering that facility even though it's a private facility.

MR. NICHOLS: May I have a moment, your Honor?

THE COURT: Yes.

MR. NICHOLS: I have nothing further, your Honor.

[69] CROSS EXAMINATION

BY MR. WATERMAN

Q Yes, your Honor. Mr. Mitchell, I assumed from your testimony that your particular area of expertise is in administration of the Forest Service, is this correct?

A At the present time, yes.

Q All right. You don't have any independent knowledge of or claim to be say a real property appraiser, is this a fact?

A Right.

Q All right. So your testimony here today has been based entirely upon the various policies that you had to administer for the Forest Service pursuant to the Manual that's in evidence, the circular and your own Regional Supplement, is this correct, sir?

A Yes, sir. Also based upon my own experience as a district ranger and some actions that I had to take.

Q Right. I appreciate that. How long have you been with the Forest Service?

A If you would have asked me total Federal service I could have answered easier. With the Forest Service, about sixteen years.

Q I see. Now, earlier you testified that I believe your testimony was your regulations require that you conduct a survey of private rental availability, is this correct?

A Yes.

[70] Q And that's once every three years?

A Right, by mandatory direction of the Bureau of the Budget.

Q And when that is conducted then you utilize the samples or the information you gain and you establish a base rental rate, is this correct, sir?

A Yes.

Q And that is a base rental rate for Class A, Class B, Class C residences?

A Yes.

Q And also I assume a rental rate for trailers I think you mentioned house trailers, is this true?

A We used to try to get comparable information for house trailers and for various type facilities, but there are so few of those on the rental market at the present time that we discontinued that practice a number of years ago.

We only now try to get it for comparable type of family dwellings.

Q Now that rate, when once established, that continues uniformally throughout the three-year period, is that correct?

A The base rate, that's right. It cannot be changed.

Q And that applies to the residence as such, is this correct?

A Yes.

Q Because it does make a difference, does it not, the [71] actual rent deducted from the employee depends upon other factors other than you've mentioned such as the amenities, the distance from the dwelling to an established community, is this not true?

A Well, the amount—if I can try to answer your question, sir—the amount of bi-weekly rent that's deducted from an employee's salary is directly related to first of all the base rate for that dwelling and then the adjustments that are permitted within the guidelines of the Chief of the Forest Service, the regional forester and the Bureau Budget.

And in the main there are only two adjustments made, one is for distances of established communities which is called an assessibility adjustment and number two is for amenities or lack of amenities. There are several others but there are exceptions.

Q Right. There are adjustments made for personal requirements, are there not, depending upon the family living in that particular dwelling?

A For personal requirements?

Q Yes, sir. By that I mean, family size, constituency and this sort of thing. What I'm getting at is suppose you have a Class A dwelling which as you said I believe is a three bedroom dwelling, is this right?

A Yes.

Q And supposing you have a—well, to make it [72] realistic, man and his wife living in that Class A dwelling, right?

A Uh-huh.

Q And a certain amount of money is going to be deducted every two weeks for their rental in that dwelling, is that correct?

A Yes.

Q Now, assuming that they are replaced by a man and a wife and four children, all of the things being equal, will the amount of their rent be the same?

A Identical.

Q It will. There is no provision—strike that.

Is there any provision when you are, say, forced to locate a bachelor in a Class A residence, three bedrooms, does he pay the same rent in all cases that the family with four children pays in that identical residence?

A Yes, he will, with this exception: He does have the option of applying for a reduction in rent based upon his not needing all of the space available.

Q Right.

A Now, if that happens you could take an example of the man and a wife living in a three bedroom home. They only need the one bedroom or say they need two bedrooms, one for the additional furniture they have, but they don't need the third one. He can apply for a reduction in rent with the understanding and a mandatory provision that he [73] not be allowed to use that third bedroom even for storage purposes. It must be sealed off per se and locked. It's not available to him.

Q All right. And isn't there also a requirement that in such cases where you may have, in other words the dwelling he's assigned to may be excessive for his needs, isn't the amount he has to pay for rent limited to a certain figure, a maximum figure of his salary?

A Only in the cases of an adjustment and I can't recall precisely where it is. If you give me a minute I think I could find it in the recent five supplement here or the parent text.

Q I would appreciate that.

A I'm sorry, I'm taking time. I can't put my finger on it right now, but as I recall the amount of rent that an employee can pay cannot exceed twenty percent of his salary.

Q Yes, that was the figure I had reference to and that's in your regulations, isn't it?

A It's somewhere. I'm sorry I can't put my finger on it. I'm trying to search back four years now.

Q Right. So it's conceivable, is it not, that one particular dwelling over a three-year period that has a base rental rate set for that, the actual rent paid by the occupants thereof, depending upon their family status and

other personal circumstances, can vary to some degree, is this not true?

[74] Yes, it's possible.

Q Isn't it also true that actually a yearly rate is established for that, of the employee occupied government owned housing and then that rate is broken up into twenty-six pay periods for convenience of the government employee?

A No, the rate that's actually established is a bi-weekly rental rate irrespective of how that's computed. And the basic rates are listed that way. They're always shown as the bi-weekly base rate. They never say this is the annual rate divided by twenty-six point one to come up with it.

Q There isn't anything in your regulations as to how this is established?

A There's directions, right, but it's somewhat academic. It's a mathematical situation as to how you come up with the definition of a pay period rate, a pay period span is two weeks' time.

Q In determining the rental rate for that specific residence you don't look at it for a two-week standpoint. You look at it for at least a period of a year and then break it down for the individual employee, do you not?

A No, no. Based upon a private rental samples that we take, part of the information—in fact the information that's really used in structuring our base rate is the amount of rent the occupant is paying on that private residence at that point in time. And usually the rent is [75] paid once a month. And so it's normally a monthly rate.

Now, those are, or that rate is broken down into a two-week period in order to determine what the bi-weekly base rate will be when they're averaged out.

Q This is when you develop the basic rate itself, is that correct?

A Yes, the base rate.

Q I was referring to 6445.31 which—

MR. NICHOLS: Is this of the manual?

MR. WATERMAN: The amendment, no, of the Forest Service Manual.

Q —where it states that monthly rates will be converted to pay period rates by multiplying by a factor of 0.46?

A Right. You see that relates back to the private rental survey again where normally you get a monthly rate. People pay by the month on the private market, not by a two-week period.

Q Now you mentioned that there is also regulation that this housing can only be used for official purposes, is this correct, sir?

A I don't recall having stated that specifically, but that is in essence what it amounts to is, it's for employees of the United States.

Q Right, and I think in many cases some of these residences are the only homes these employees have ever had, [76] isn't that true? You mentioned fifteen years in some cases.

A Yes, that's true.

Q And normally I would assume in that case that they would not have any other privately owned or leased dwelling that they resided in at any time of the year, is this true?

A Not in all cases. We do have situations where we have a dwelling which is occupied by one of our people during the summer months because it's in the higher elevation; in the wintertime it's snowed out and he is forced to move down to a winter location and in that situation, why he either purchases, leases or rents a private dwelling.

Q As far as his use and enjoyment of the government owned residence, there is no regulation that says he can't have weekend guests there at his invitation, is there?

A None whatsoever. He may not be there.

Q Right. As far as this painting of the house is concerned, seems to me I read in one of the volumes of regulations here that the occupant does have something to say about the color the interior of the residence might be painted, isn't this true?

A If he or his wife like a particular color and the district ranger or the forest supervisor have no objection to that, that's the color of paint that will be used.

But, if either the district ranger or the supervisor object to it, that isn't the color that will be used. In other words, he doesn't have a right to specify the color of [77] paint that will be used.

Q He can't mandate the color but he can request?

A He can request, right.

Q And I assume the Forest Service being generally one big happy family, the district supervisor or whoever is immediate supervisor would go along, right?

A Occasionally we have had to say no because we get some people, you know, like the bright psychedelic colors that kind—you walk in in midday and it looks like somebody turned on the lights. But those are exceptions.

Q In the dwellings that are partially dwelling space, bedrooms, kitchens and so forth and partially office or public areas in the same building, isn't an apportionment made of the rent as to the area devoted to the official or public area as contrasted with the private area of that home?

A Yes. A nominal amount, a reduction in the rent can be allowed on a sliding scale up to as I recall ten percent. For that particular portion of the dwelling that is in fact used as a public facility, an office or visitor information center, whatever, where the public has ready access to and from that.

Q Now, I don't know that this was covered on direct or not, but I'll ask you anyway. Isn't there also an adjustment made where you have a severe interference with a normal family home life, in other words, excess public traffic [78] or excess noise or radio communication, this sort of thing?

Do you make an adjustment for that also?

A No, under no circumstances. In fact, we are prohibited by the Bureau Budget of Direction of making any adjustments on the basis of the criteria you just outlined.

Q All right. I just may have misinterpreted something.

A I think that is stated in Circular A-45 rather clearly.

Q And in your official regulations you do from time to time refer to the employee occupant as a tenant, don't you?

MR. NICHOLS: I would say that the regulations speak for themselves, your Honor.

MR. WATERMAN: All right. I'll withdraw the question, your Honor.

THE WITNESS: We normally don't refer to your people, in answer to your question, as tenants. I have very seldom heard the term used. We refer to them as employees.

Q BY MR. WATERMAN: Well, I had specific reference to, I think a portion that you actually wrote of this manual if I recall your testimony, 6445.02E, occupant maintenance responsibility, replace broken glass when tenant negligence is involved. You mean the employee occupant, right?

A Right.

Q But you call him a tenant here, right?

[79] A Yes, I guess it's a matter of semantics.

Q And also that section, sub-section M of the last sentence, a lot line should be established for each residence to indicate tenant's responsibility, again referring to the employee occupancy?

A Yes, we could have just as easily said occupant's responsibility.

Q Mr. Mitchell, are you familiar with the names of the individual plaintiffs in this case and their housing in 1967 which was the subject of this assessment?

A Not all of them.

Q In other words, if I read you a list of their names and the location, could you tell me whether they were required to be in that housing or whether it was permissive?

A I could not tell you because you see at that point in time I was in a sub-staff capacity to the regional forester in San Francisco and had no direct authority on the assignment of government quarters.

Again that distinction or authority is delegated to the supervisor and to the district ranger and they would have to answer that question.

Q Very well. In developing the base rental rates in 1967, did you yourself conduct any of the sampling as far as the comparable rentals available anywhere in your area?

A No, I did not.

Q Was your function mainly to compile them and collate [80] them and then draw your conclusions from them?

A Well, it went a little further than that. Basically my responsibility was to write the directions to the supervisors outlining the criteria under which the private rental samples would be made and the designated communities in which those samples would be conducted, setting up the target dates for the information to be gathered to be in the regional forester's office.

When it was received I and my assistant analyzed that data in accordance with the direction of the Bureau of the Budget Circular and the Forest Service Manual and computed and established the base rates which were authorized by the regional forester in the subsequent publication of this supplement.

Q Now, the actual amount of rental charged the employee varied somewhat with the furnishings that were provided in that unit, is this not true, sir?

A I can tell you honestly that I don't know of a single case in a region where we were, the forest or the district was actually charging an employee for furnishings, primarily because government residences in the main are basically unfurnished.

There is usually a hot water heater and a stove and there may or may not be a refrigerator and that's about it.

Q All right. I was just referring to 6445.52 I guess it is—

[81] A Right, there is a provision in there. In some instances it's conceivable that we would have furnishings in a dwelling there that we would charge the employee of, but I don't know of any case in the region at the time I was administering it.

Q All right. Now, in the case where you had an employee who said lived down here in the valley during

the wintertime and was required to go to the mountains for by reasons of his employment and he was unable to, he was either owned or buying his home here in Fresno, let's say, and he was required to go up to Dinkey Creek, for instance.

Was there any adjustment made for in effect his having to pay for two residences at the same time?

A Not if one was a private residence.

Q It was not.

A No, only if he occupied two government residences at different times of the year, such as if the situation on the Kings River District where we have a summer and a winter headquarters. The ranger there would pay for his residence for the time he was living in it. He would not pay for the second one that he wasn't living in.

Q I see. That might even have been a different rate for the two residences?

A They were.

Q They were?

A Yeah.

* * * *

[82] Q BY MR. WATERMAN: Mr. Mitchell, you mentioned that in times of dire emergency that you did have the right and did occur that family groups would be dispossessed for a short period of time while the emergency existed I suppose, is that right, sir?

A Yes. I think I also stated that this is an infrequent occurrence, but it has happened.

Q Right. And as a practical matter, does not the Forest Service in similar case of emergency where a privately owned residence be located would also have the right of condemnation of residence for official purposes?

A No, they do not.

Q They do not have the right of condemnation?

A They have the right of condemnation under law in certain situations but they do not have the authority to go in and take over a private residence for their own use.

Q All right. Now you mentioned about the Forest Service locks. Is there any restriction in any of these

[83] regulations that one of your employee-tenants cannot lock the door of his bedroom, his private bedroom?

A There is nothing in the regulation to my knowledge that says he can't lock it. However, the simple facts are that none of those doors have locks on them. There are no interior locks to my knowledge.

Q Is there any regulation that he can't put an interior hasp and his own lock on that door to lock out the public area or the common area of that building?

A To my knowledge there is nothing that says he can't, provided he does it through—if this isn't construed to be more than just normal maintenance which he is responsible for. What I'm saying, he may have to submit a request to his district ranger to get approval to put that lock on there.

Q As an addition or modification of the building?

A Yes.

Q Do you know of any cases of one where this has been requested?

A No, I would have to say I don't.

Q I think you testified, Mr. Mitchell, that some of these residences that are government owned and in communities where the family would reside there all year around, this I think was your testimony, there are such dwellings, is this not true?

A Yes.

* * * *

[85] Q BY MR. WATERMAN: Now, Mr. Mitchell, you testified that in the hierarchy in a district or in a forest that the forest supervisor would have the right to make reasonable inspections of his next immediate subordinate or any subordinate to him I take it?

A That's correct.

Q And the district forester would have the right to inspect the fire control officer's residence on a reasonable basis, is that right?

A Yes, and in general I suppose I should have clarified this at the time. The authority is not necessarily restricted to the supervisor, for example. He also has a staff.

Q Right.

A And any of his staff that are out there in official capacity can make an inspection on any one of the residences on any of the districts.

Q Right. But I assume, and correct me if I'm wrong, that the reverse is not true, the fire control officer doesn't have the right to enter the district ranger's home, for instance, on official, well, for inspection purposes?

A Well, if he wanted to push it he could. If his responsibility was in connection with the fire safe aspects [86] of that structure and that's basically what part of his job is and he was making it his inspection, annual or semi-annual or whatever he does have the authority to go in and inspect the ranger's residence.

Q I was assuming he wanted to remain in that district as an officer.

A I have to agree it may not result in the best of relationships, but it has happened.

Q Well, isn't it a fact, Mr. Mitchell, that with all these regulations and everything your people are, pretty well try to cooperate and work together and you probably have very little frictions because people don't mandatorily apply these regulations, is this a fact?

MR. NICHOLS: I would object to that question again on the ground of materiality, your Honor. It seems to me the issue in this case is what the government's rights are and whether or not the government chooses to exercise those rights is immaterial.

We're talking about the exclusive use and possession which in my view involves the rights of the parties and whether those rights are actually used for any of a number of reasons is immaterial as long as there is a potential for them being used.

THE COURT: Mr. Waterman?

MR. WATERMAN: Well, your Honor, we have had a great deal of testimony from this witness as to all these limitations [87] on the rights of these people that occupy this government housing.

And almost like it was a prison the way I got it and I was just asking him as a practical matter, and I think he's already testified to it that these people treat these residences as their home and as a practical matter, there

is very little friction or abuse of these regulations and that's all I wanted to get out of him. I think it's a fair question.

MR. NICHOLS: I submit it, your Honor.

THE COURT: Well, I agree that there is a lot of testimony. I think that it's really answered, but I believe that your, this question as framed is objectionable, so I'm going to sustain the objection.

I think we would have to almost assume that these rights wouldn't be exercised on a daily basis or weekly or you would have utter chaos as far as the employees of the Forest Service are concerned.

But, there is ample evidence, I think, that in many cases it doesn't happen very often.

MR. WATERMAN: I believe I have no further questions on cross, your Honor.

REDIRECT EXAMINATION

BY MR. NICHOLS:

Q Mr. Mitchell, you were asked on cross concerning [88] rental rate adjustments based on the personal circumstances of individual employees and you gave testimony that there was a limitation of rental rates to a maximum of twenty percent of the salary of an employee, employee would not be required to pay more than twenty percent for his occupancy.

Now, have there been, to your knowledge, any cases in which adjustments were made because an employee would normally have had to pay more than twenty percent of his salary?

MR. WATERMAN: I'm going to object, your Honor, for the same reason.

THE COURT: Well, it struck me the same way. I'll sustain the objection.

MR. WATERMAN: Thank you.

THE COURT: I think it's a two-edged story.

Q BY MR. NICHOLS: All right. Would it, as a matter of regulation, who makes the determination as to whether an adjustment on this twenty percent basis is to be made?

A The forest would make the initial computation on the reduction in rent there based upon a request from the occupant, from the employee.

The supervisor does not have the authority to approve that. That has to be approved by the regional forester. In other words, he would have to submit it along with his rational or recommendation that the rent be reduced X number of dollars because of this and then the regional forester [89] either approves or disapproves.

THE COURT: Apropos of the last question and objection that we had, I presume it would be material if we were dealing with the specific rent of one of these plaintiffs, whether there had been a reduction because of this, I think that would be material.

MR. WATERMAN: Yes, but I don't think there was any testimony—

THE COURT: There isn't at this point, but I was just stating this for clarification.

MR. NICHOLS: I am in effect attempting to prove a negative, your Honor. My offer of proof is there have been no requests of this type.

THE COURT: From anyone including the plaintiffs?

MR. NICHOLS: From anyone including the plaintiffs.

THE COURT: Well, then that goes to the point that I'm raising then and I would allow you to ask that question.

MR. NICHOLS: Thank you.

Q You said that the regional forester would make a determination, would be the one for making the determination as to whether an adjustment on the twenty percent basis was to be made.

Now, when you say the regional forester, do you mean him personally or do you mean some sub-staff under him?

A I mean his staff. When I was sitting in that chair I would make the judgment. I would check out their calcula- [90] lations, their rationale, if it came to me, and make my recommendation to the regional forester to either allow or disallow.

Q And did any such requests ever come to you when you were in that position?

A No.

MR. NICHOLS: Thank you. I have nothing further, your Honor.

RECROSS EXAMINATION

BY MR. WATERMAN:

Q How long were you in that position, Mr. Mitchell?

THE COURT: Excuse me. Apparently the jury has a verdict, so we will take a recess in this case.

THE WITNESS: You want me to answer the question? Five and a half years.

THE COURT: The question was how long you were in that position?

THE WITNESS: Yes, your Honor.

THE COURT: Is that right? I didn't hear it because I was listening to what the Bailiff was saying.

THE WITNESS: Five and a half years.

THE COURT: All right.

(Whereupon, a short recess was taken in this case to handle other matters.)

(Whereupon, the last question and [91] answer was read back by the Reporter.)

MR. WATERMAN: I forgot what my original train of thought was. I don't think I have any more questions, your Honor. Thank you.

MR. NICHOLS: I have nothing further of Mr. Mitchell.

THE COURT: Very well. Are all of these witnesses going to be here anyway or can they be excused?

MR. NICHOLS: I think I'm going to keep Mr. Mitchell around for a while anyway.

THE COURT: Then you are not excused.

THE WITNESS: Thank you, your Honor.

MR. NICHOLS: At this time, your Honor, the government will call Mr. Paul Meischke.

PAUL THEODORE MEISCHKE called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

Q Would you state your full name, please?
A Paul Theodore Meischke.
Q And by whom are you employed?
A U.S. Forest Service.
Q In what capacity?
[92] A Right now in the resource staff officer in the Mendocino source.
Q And during the year of 1967 by whom were you employed?
A U.S. Forest Service.
Q And in what capacity?
A As district ranger on the Kings River District in Sierra National Forest.
Q And you are one of the individual named plaintiffs in this action, are you not?
A Right.
Q Now, in your capacity as district ranger in 1967, did you have occasion to assign and re-assign persons subordinate to you in connection with government quarters?
A Yes.
Q And I want to draw your attention specifically to a gentleman by the name of Robert Swirtz. Was he one of your subordinates at that time?
A Yes.
Q And he is also one of the named plaintiffs in this action, is he not?
A Right.
Q Did you have occasion to cause Mr. Swirtz to be re-assigned from one quarters to another during that year?
A Yes.
Q And would you tell the Court what type of a facility [93] he was re-assigned from and what type he was re-assigned to?

A He was living in a converted Quonset hut that was made over into living quarters when I first met him. You want the whole history or briefly?
Q Please.
A And when he was living there at first he was married, one foster child or step-child rather. And then in the course of a couple years then he and his wife were separated and beings then he was a single or bachelor living by himself, we had other employees on the station and one in particular who was married with three children.
You want the reason for the re-assignment?
Q Yes.
A That I re-assigned quarters, okay. In my judgment Mr. Swirtz was pretty valuable employee, however he was a professional forester and as such he would probably have to seek employment with the Forest Service and I felt the risk of moving him out of the house was pretty small as far as he would become despondent and leaving us.
The other employee was doing pretty much menial labor of a type that's pretty hard to replace. He did campground, still does campground clean-up, garbage clean-up work and those people aren't easy to come by.
His wife was pretty unhappy with three kids in a house trailer, so I felt the benefit to the Forest Service in this case would be to move the bachelor, Bob Swirtz, since he was [94] single then into a house trailer and move the other employee with the family into this Quonset hut, and I did it.
Q All right. How much notice, if any, was given to Mr. Swirtz with connection with this move?
A I don't remember exactly, but I reasoned with him. I told him what my plans were and he pretty well agreed, and it was just a matter of a couple weeks and he moved out.
Q Now, you—have you had personal experience concerning the moving of other, of other individuals into or out of quarters?
A Assigning quarters, yes.
Q Yes.
A Quite frequently, yes.

Q And about—how long were you a district ranger?
A Just short of twelve years.
Q And during that period of time do you have any type of an estimate as to how many times you had to move employees in with other employees for emergency purposes?
A Oh, probably not more than a half a dozen times.
Q These were in connection with what?
A Fires.
Q Was—you heard Mr. Mitchell's testimony concerning the existence of locks, Forest Service locks with common keys.

Was that the situation in the Kings River District when you were district ranger?

[95] A Yes.
Q Have you had any experience concerning a policy of the Forest Service to encourage the public to contact Forest Service employees at these quarters?
A Yes.
Q Would you tell the Court what that experience is?
A Well, specifically if we can pick it out right now in the phone books at the areas that cover Big Creek and Dinkey Creek and Trimmer, the Forest Service phone number is listed under U.S. Government Forest Service and directly underneath in two or three numbers are shown and these are numbers of individuals that have had phones installed and are paying for the phones in government quarters and they are listed there.

If there is no answer at the office, then call these numbers, or words to that effect.

Q All right. Any other experience of encouraging the public to contact the people at the quarters?
A Yes. We encourage people to report fires. We have a standard sign that says report fires here and it would be at a guard station or near a ranger station and in most cases on this forest the ranger station also is an area of residence or would be of several employees and it is in there that if you discover a fire and it happens to be many many times or assume there is a fire or some other emergency, the people will very often try the office first [96] and then start around to the different buildings until they can arouse someone.

Q Middle of the night?
A Anytime, yes.
Q What is the situation with regard to radios or communications equipment in the quarters of the Kings River District when you were there?
A There were two headquarters for the Kings River District. When I was there, lived in Dinkey Creek in the summertime and Trimmer in the winter. So, at Dinkey Creek the two residents there had radio equipment in the houses and one of them was on all the time, and normally it was the one in the house that the FCO occupied and that radio was on twenty-four hours a day and he could transmit over so they could call him direct any time of the day or night and they're, or his wife and very often the wife would answer the radio and take the message and conduct the business there.
Q As a district ranger, did you have any rights in connection with going into the quarters occupied by your subordinates?
A Yes.
Q And would you tell the Court what rights you had and exercised in that regard?
A Well, for the administration of government property I was charged with, I felt any time that I felt [97] that I needed to go to one of the buildings whether it was occupied or not and see how it was being cared for, I just assumed that right based on the wording of the manual and the history of the administration of these buildings.

So, I never hesitated to just to make arrangements and go to the house whenever the employee was there.

Q How long were you a district ranger?
A Just short of twelve years.
Q And during any—during that twelve year period did any of your subordinates say to you, hey, you can't come in here, or words to that effect?
A They never denied me the right to come in, but I have a suspicion they weren't always happy.
Q Kings River District was headquartered where?
A Kings River District, winter headquarters is at Trimmer. That's east of Sanger. The summer headquarters is at Dinkey Creek.

Q Now, you had two homes during that period of time, two government quarters, is that correct?

A Right.

Q One of them at Dinkey Creek and one of them at Trimmer?

A Yes.

Q And the winter home at Trimmer—well, strike that. Which of those two homes would you have occupied on March first?

[98] A The residence at Trimmer.

Q All right. At Trimmer was there, with the exception excluding the government housing, any rental housing available?

MR. WATERMAN: I'm going to object to the question, your Honor, without some foundation being laid as to whether he ever had occasion to determine whether such housing was available. I feel there hasn't been a sufficient foundation laid.

MR. NICHOLS: I'll ask.

Q Did you ever have occasion to look into or to ascertain whether there was rental housing other than government housing available at Trimmer?

A I was usually aware or tried to be aware of anything that was for rent anywhere in the area because there were twice the number of employees working there as there was government housing, and I was always trying to come up with some scheme to find housing for the people.

Q It would be to the interest of the government to have the employees located as close to their work area as possible, would it not?

A Right.

Q And did you ascertain whether there was private rental housing or other rental quarters available other than government housing at Trimmer?

A Well, I used to contact the local people, grazing. [99] There was ranchers in the area. Because of their, the way they made a living and the way I made mine, we normally worked together and I used those people most of the time to find out the comings and goings of whether there were vacancies and some of these people even have ranch houses occasionally they would rent.

Q Were there—were these rentals available to anything like a permanent basis or were they just periodic?

A As I remember there were three or four houses that the employees rented and they were occupied by Forest Service employees, four and a half years I was there, so it's fairly permanent.

Q With the exception—how many employees were there at Trimmer at this time?

A I would just have to make an approximate thirty, thirty-two.

Q And how many were—strike that. Were any of those employees required to live elsewhere other than in the Trimmer area?

A Most of them were.

THE COURT: Most of them were required to live in the Trimmer area or were—

THE WITNESS: No, sir, most of them had to live away from the station.

THE COURT: Had to.

THE WITNESS: There wasn't no housing.

[100] Q BY MR. NICHOLS: I show you a map entitled U.S. Department of Agriculture Forest Service Kings River District. Does your Honor have a colored marking pencil?

THE COURT: Here's a red one.

MR. NICHOLS: I will ask you to indicate on the map where Trimmer is, just circle it or make an X or notation.

THE COURT: You're going to put that in evidence; I suppose you better mark it M-1.

MR. NICHOLS: M-1 or plaintiff's?

THE COURT: I mean the mark.

MR. NICHOLS: I see.

THE COURT: I don't know how important it is, but usually we mark it. That's for the witness' initial.

MR. NICHOLS: All right, fine.

THE WITNESS: Just M-1.

MR. NICHOLS: M-1.

THE COURT: All right. Now, did—strike that.

Q BY MR. NICHOLS: You occupied—strike that. During what months of the year would you occupy the residence at Trimmer?

A Normally from October 15 or June 1st, depending on the weather.

Q All right. And then during the summer and fall you would move up to Dinkey Creek?

A Correct.

MR. NICHOLS: Your Honor, I'll ask that this map be [101] admitted as government's next in order for purposes of showing the location of Trimmer.

MR. WATERMAN: No objection.

THE COURT: Any objection?

MR. WATERMAN: No, sir.

THE COURT: All right, it will be marked Plaintiff's Exhibit next in order.

(Whereupon, Plaintiff's Exhibit No. 4, map, was received into evidence.)

MR. NICHOLS: I have nothing further of Mr. Meischke.

CROSS EXAMINATION

BY MR. WATERMAN:

Q Mr. Meischke, you testified that there is—you invite the public to report fires at your ranger stations and so forth; as far as—in your experience, as far as the enjoyment and use of that residence in the hills, do you feel this is a great advantage?

A Yes.

Q It is. Now, as far as the radios that your agency utilizes in its work, isn't it a fact that most traffic is during the daylight hours when there is no emergency?

A Correct.

Q Okay. So at nighttime in the absence of an emergency you can hear the crackling, I mean, of the outside speaker many times or the inside speaker, but that's [102] about it, is that right, if there is nothing going on?

A Essentially correct.

Q You also testified that from time to time you had occasion to enter the government-owned residence of one of your subordinates.

I assume this was mainly for purposes of inspection of the condition of the interior of that residence?

A Occasionally I suspicioned that there was damage being done to the residence and I inspected it.

Q And was it not normally your practice to, one, make sure that in the family situation that the husband was going to be home and when you tried to enter that residence?

A That's right.

Q And I would take it that normally you would request permission and advise the occupant of the reason that you wanted to enter, isn't this true?

A No. I just tell him that I wanted to.

Q All right. And I think you said in almost every case the permission was granted, but you felt that sometimes they were unhappy about it, is that right?

A Right.

Q You were never denied the right to come in or there was never any unpleasantness about it that went any further?

A Unpleasantness came from the place being tore up and disciplinary action.

[103] Q I see. In other words, as a result of your inspection disciplinary action had to be taken, is that right?

A Right.

Q But I mean as far as the right, the fact of your entering the residence for purposes of inspection, did that create a great conflict?

A No.

Q How far is Trimmer from Sanger, sir?

A Thirty plus miles.

Q And how many people did you have residing at the station at Trimmer during the winter of '67, for instance?

A Employees?

Q Yes, sir.

A Okay. I'm going to have to estimate here. Fifteen.

Q How many separate dwelling places were there at the Trimmer Station in 1967?

A Four homes, three bedroom houses and one duplex and a small one bedroom cabin-like structure and the Quonset hut and probably five trailers that were occupied.

We have several trailers that some were and some weren't.

Q Some were occupied and some weren't?

A That's right.

Q So the facilities you didn't have there were apparently for employees with larger families, is that right?

[104] A Right.

Q And I would take it from that that as far as the four three-bedroom homes and duplex and maybe even the small bedroom, these were all occupied by families of your subordinate and yourself?

A Yes.

Q Did you have a family living with you up there at that time, sir?

A Yes.

Q How many children?

A Three.

Q What were their ages in 1967?

A Sixteen, thirteen and nine. Don't quote me.

* * * *

Q When you moved up to Dinkey in the summer, what type of facility did you have, your family have up there?

A We had a one bedroom.

Q One bedroom home?

A Cabin.

Q And did all the members of your family accompany you up there in the summertime?

A Yes.

Q This was considered an advantageous or desirable [105] part of your employment, wasn't it, being up in Dinkey in the summertime?

A I can't really say yes because of the, it was necessary to be up there. Weather conditions were nice; living conditions weren't.

Q More work for you up there in the summertime than there was there in Trimmer in the wintertime I bet, right?

A Probably, yes.

Q Now, the personnel, stationed personnel at Trimmer who didn't reside on the station, where would you say for the most part they resided?

A Tollhouse area and Balch Camp and as far as Orange Cove.

Q I see. Any as far as Sanger or Fresno that would commute?

A Yes. There was one or two that lived in Sanger.

Q You mentioned that, if I can find the name, oh—when Swirtz and his wife separated you felt it was desirable for the needs of the Service to ask him to leave the Quonset, is that right, and go into other quarters?

A That's right.

Q And I believe you said that you gave him notice and you discussed this with him before you took that action, didn't you?

A Yeah. I told him I thought it would be a real good idea if he went along with it without—

[106] Q Did he go along with it?

A Yeah.

Q No particular problem with that, is that right?

A He was more concerned about his divorce than he was about living quarters at that time.

Q I see. How many residences were there at Dinkey in 1967, government-owned residences?

A Two.

Q Two. You, your family and the other was occupied by the fire control officer, is that correct?

A No. The other was occupied by forester in charge of the timber operations.

Q Did he have a family that lived with him up there in the summertime?

A Yes.

MR. WATERMAN: May I have a moment, your Honor?

THE COURT: Yes.

Q BY MR. WATERMAN: Your personnel that lived away from the Trimmer Station at that time, did they have the same normal working hours that the personnel who lived on the station had?

A Yes.

Q What is the elevation at Trimmer?

A A thousand feet plus or minus.
MR. WATERMAN: Thank you, Mr. Meischke.

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[107] REDIRECT EXAMINATION

BY MR. NICHOLS:

Q Mr. Meischke, you told us that there is not much transmission on the radio speaker at night even though it was on. The transmitter was on twenty-four hours a day also, was it not?

A Yes.

Q So whatever went on in the house could, to a greater or lesser degree, go over the radio as being transmitted, would it not?

A You have to activate the speaker. It's not like this.

Q I see.

A However, the normal working days in the summertime with forester people usually starts in somewhere around 6:00 o'clock in the morning with look-outs checking in and it lasts to about 9:00 o'clock at night, 9:00 or 9:30. That's usually the transmitting hours.

Q In connection with moving Mr. Swirtz out of the Quonset hut you said he went along with it. What would you have done if he hadn't gone along with it? Would you have moved him out anyway?

* * * *

[108] Q BY MR. NICHOLS: What would you have done if he hadn't gone along with it?

A My plans were to move him out and I would have moved him out.

Q Whether he liked it or not?

A Right.

Q Now, he was still employed by the Forest Service after you moved him out, was he not?

A Yes.

Q And this didn't affect his employment in any way, did it?

A No.

* * * *

[109] WILLIAM P. COOK called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

[110] Q Would you state your name, please?

A William P. Cook.

Q And by whom are you employed?

A U.S. Forest Service.

Q In what capacity?

A I'm a district fire control officer.

Q And during the year 1967 by whom were you employed and in what capacity?

A U.S. Forest Service and I was a Sierra Helitack Foreman.

THE COURT: A what?

THE WITNESS: A Sierra National Helitack—

THE COURT: A teletype?

THE WITNESS: Helitack, helicopter.

THE COURT: I see.

Q BY MR. NICHOLS: Is that in connection with fire spotting?

A No, this is strictly an air operation worked out of a base situated at Trimmer Station.

Q What do you do?

A We have a small crew and we're there seven days a week with the helicopter dispatched to any fires that break out on mutual aid state areas of Sequoia, mutual aid areas or the Sierra National Forest, this is on the entire forest.

Q Have you had any experience in connection with the [111] moving of Forest Service personnel out of their quarters?

A Yes.

Q And would you tell the Court what that experience is?

A During the rough fire of 1964 and I believe the dates were nine, five to nine, twenty, we moved our

patrolmen out of his quarters, patrolman and his wife, and took the quarters over for GHQ to run the fire.

Q All right. GHQ, general headquarters?

A General headquarters. We evicted the man and his wife so we would have the house available with electricity and radio and phone out.

Q You've heard the testimony concerning identical government lots. Has this been true in your experience?

A Yes.

Q And you have heard testimony concerning the Forest Service radios inside the houses turned on on a twenty-four hour basis. Has this been in accordance with your experience?

A Yes.

Q Have you had any experiences with the public seeking to contact you at the, at your residence quarters?

A Yes.

Q And would you tell the Court what that experience has been?

A Well, numerous occasions a tourist will come in [112] after working hours and want a camp fire permit or want first aid or have some sort of emergency needing a tow job or something and this could be any hours of the night.

They may want to report a sawmill smoke they presume is a fire and they will get you out of bed if it happens to be after you went to bed and conduct the business.

Q Have you had any experience concerning seeking to make improvements to the quarters that you occupied?

A Yes.

Q And would you tell the Court what your experience in that area has been?

A I have a two-bedroom house with three children and I looked into the matter of boxing in my carport to make an extra bedroom and was made aware of the fact that Mr. Mitchell testified to that it would change the classification of my house and raise the rent and that there was no monies available to do this, and if I wished to do this I could do it with my own money.

Q But you would have to pay more rent?

A Right. This would change the classification of my two bedroom house to a three bedroom house.

Q As a result of that information, did you in fact add to the carport?

A No, I didn't.

Q Where were you stationed in 1967 again?

A Trimmer Ranger Station.

[113] MR. NICHOLS: I have nothing further of Mr. Cook.

CROSS EXAMINATION

BY MR. WATERMAN:

Q You were at Trimmer all year long during that time?

A Yes, sir.

Q Mr. Cook, and in 1967 you had three children there, is that correct?

A That's right.

Q What were their ages, sir?

A One was four, six and nine.

* * * *

Q BY MR. WATERMAN: Very well. Did you maintain any other residence other than the government housing at Trimmer?

A At that time, no.

Q Okay. Was there any government office space in the home that you rented at Trimmer?

A Outside of my radio area and small desk, I could say no.

Q Were you charged for that, this space that the [114] radio and your desk were located in?

A It went along with the rent of the house.

Q Was there any adjustment made as far as you know?

A No.

Q You testified that you had moved a patrolman and his wife out of their quarters during 1964?

A Uh-huh.

Q Where was this?

A Black Rock Guard Station.

Q All right. Where did the wife go?
A She was sent to the valley by her husband since he had to fight the fire. There was nowhere for her to stay.
Q What was the name of that fire did you say?
A The rough fire.
Q But as far as you know she wasn't turned out into the street without a place to go, is that right?
A Well, she could have stayed there and slept on the ground, but other than that she had to go to the valley.
Q How long a period of time was this do you know that she was there?
A Well, the fire was from 9/5 till 9/15, approximately ten days.
Q Ten days?
A Or, excuse me, 9/20, fifteen days.
Q Fifteen days. How many years did you live at Trimmer prior to 1967?
[115] A Five years.
Q Five years. You, during the years prior to and 1967, were you or your family ever dispossessed of your residence at Trimmer?
A No.
MR. WATERMAN: I think I have no further questions on cross, your Honor.
MR. NICHOLS: I do have an area I neglected to go into on direct, your Honor. May I have permission to re-open my direct?
THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. NICHOLS:

Q Mr. Cook, have you resided at Pine Ridge?
A No, you mean Pine Flat?
MR. NICHOLS: I'm not sure what I mean if I can have a moment, your Honor.
THE COURT: Yes.
Q BY MR. NICHOLS: Were you ever employed on the Pine Ridge District?
A No.

MR. NICHOLS: All right, I have nothing further then.

RECROSS EXAMINATION

BY MR. WATERMAN: Q Do you recall what your rent was, what [116] you paid the government to live in that house in 1967?
A I can't be exact. It was in the neighborhood of $28.00 a month.
THE COURT: This was a two bedroom house?
THE WITNESS: At the time in '67, yes, it was, two bedroom.
Q BY MR. WATERMAN: Was it furnished, Mr. Cook?
A No.
Q All the utensils and cooking stove and beds and so forth were yours, is that right?
A Correct.
MR. WATERMAN: No further questions.
THE WITNESS: This, if I may clarify the cheap rent. This was a duplex motel type duplex converted into two houses with a carport separating the two. It actually wasn't a single residence.
Q BY MR. WATERMAN: Four rooms in your section, is that right?
A Uh-huh.
Q Did you pay your own utilities at that time?
A Yes.

* * * *

[117] JESSIE R. LUNA called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

Q Mr. Luna, by—would you state your full name, please?
A Jessie R. Luna.
Q And by whom are you employed?
A United States Forest Service.

Q And in what capacity?
A I'm fire control technician in the Hume Lake District of Sequoia National Forest.
Q Sequoia National Forest?
A Yes, sir.
Q And is that Hume Lake District known by any other name?
A Well, sometimes I call it Hume Lake Forest.
Q All right. Were you employed at this location and in this capacity in 1967?
A No, I wasn't.
Q By whom are you employed and in what capacity and [118] where in 1967?
A I was employed by the Forest Service, but I was a patrolman at the camp station in neighboring Sierra Forest.
Q Neighboring—
A No, I'm sorry. I was still at Pinehurst but had headquaters at Hume Lake District.
Q At Pinehurst?
A Right.
Q Okay. I'll show you a map, Mr. Luna, of the Sequoia National Forest and ask you to identify Pinehurst where you were residing in 1967.
A May I borrow this pen?
THE COURT: Yes.
Q BY MR. NICHOLS: And I guess mark that with a H-1 or excuse me, an L-1.
A Okay.
MR. NICHOLS: And ask that this be admitted, your Honor, as government's next in order.
MR. WATERMAN: No objection.
THE COURT: It will be Exhibit Five.

(Whereupon, Plaintiff's Exhibit No. 5, a map, was received into evidence.)

Q BY MR. NICHOLS: Mr. Luna, were you in 1967 familiar with whether or not there were private quarters available for rental in Pinehurst?
[119] A No, I don't recall whether there were any private quarters available.

Q All right. Now, did you have any experiences in connection with either moving someone into your house or you moving into someone else's house in your duties?
A Yes, before I moved into Pinehurst I was stationed at Camp 4½, neighboring Sierra Forest and Sierra had a fire. They had an emergency and yet people were sent to go into my house, about nine people.
Q How much notice did you get before these nine people moved in?
A An hour to forty-five minute drive and I got called in the radio and they said you're going to have nine people at your house.
Q And it took them as long as it took to make the forty-five minute or an hour drive?
A Right.
Q Have you had any experience in connection with interruptions by the public at the place, at the quarters where you have been residing?
A Numerous. I live at Glass House Ranger Station at Pinehurst and many many times there's, after hours the office closed and no people in the front houses or people know where I live so they just come around either to leave me an application or inquire about anything that has to do with Forest Service work.
[120] Q All right. This is not just—strike that. Has this happened only occasionally or has it happened frequently?
A Oh, frequently.
MR. NICHOLS: I have nothing further than that.

CROSS EXAMINATION

BY MR. WATERMAN:

Q Mr. Luna, may I take a look at that map of the Pinehurst area. Pinehurst is in the Sequoia National Forest, is that right, sir?
A Yes, sir.
Q And in looking at the map again, how far would the Pinehurst Ranger Station be from, oh, Grant Grove Wilsonia area?
A About around eighteen miles.

Q Nineteen miles?
A Eighteen or nineteen miles.
Q Right, and there are rental cabins at Wilsonia, is that right?
A I presume so. I don't—
Q All right. Were there any other rental cabins that you know of that are closer to Pinehurst?
A Oh, every once in a while there's a house vacant but no set forth at Pinehurst there is a few shacks. They're not worth for a bear to live on, but they're there.
Q All right. How far is the community of Miramonte [121] from Pinehurst?
A Five miles.
Q Five miles. And there are homes there, is that right, sir?
A Yeah.
Q And the community of Dunlap is how far from Pinehurst?
A Oh, I would say another five miles, about ten, ten miles from Pinehurst, somewhere around there.
Q Okay. And to your knowledge are there any rental homes in Dunlap area?
A Oh, periodically there are.
Q Okay. And in 1967 you didn't maintain any other residence other than your government quarters at Pinehurst, is that right?
A No, I had my private home in the valley.
Q You did?
A Yeah.
Q I see. Did you reside in Pinehurst year round or—
A Yes.
Q I see. Was your home in the valley rented out or leased out?
A No, I had it vacant at that time.
Q It was vacant. Do you recall what your—well, strike that. What, in 1967 what did your family consist of, sir? Who was in the family?
[122] A My wife and three children.
Q And the family lived with you in Pinehurst in the government quarters, is that right?
A Right.

Q And do you recall what rental you paid to the government in 1967 for those quarters?
A No, I don't.
Q You can't recall?
A No, I have to guess and it won't be accurate.
Q Prior to 1967 how long did you reside at Pinehurst?
A I moved in that house around 1964 I believe. I could be off a few months.
Q And you said before that you worked in the Sierra National Forest?
A No, I joined the Sierra National Forest, still in the same district.
Q I see. And you resided in government quarters in the Sierra National Forest?
A Right.
Q Do you still live at Pinehurst, sir?
A Right.
Q In the same house you did in '67?
A I do.
Q Now, is that house in Pinehurst, does it have any government office space in it as such or is it solely a residence that you use?
[123] A Other than my desk that I keep all my government junk in there, that's all.
Q There's no public area as such as an office, a public office for people to come into, is that right?
A No, but they still do.
Q Right. And what rent do you pay now, sir, to the government?
A I believe it's in the neighborhood of eight or nine dollars a pay period, somewhere around there.
Q How much?
A Eight or nine dollars a pay period.
Q Eight or nine dollars a pay period?
A Uh-huh.
Q Every two weeks?
A Every two weeks, yeah.
Q I know you told me you couldn't remember what it was in 1967, but has it gone up from 1967 to the present time, do you know?

A I think it was a reclassification went through since then, and I don't know whether it go up and down but the house got condemned and they fixed it up somehow so it's livable.

MR. WATERMAN: I see. I think that's all I have, your Honor.

REDIRECT EXAMINATION

* * * *

[124] Q [MR. NICHOLS]: Why, Mr. Luna, if you had a house down in the valley that was vacant, didn't you live in it?

A Well, it would mean for me to commute from the valley. It would be an hour and fifteen minutes, and hour and twenty minute drive one way every day and it's just, [125] won't be feasible for me to do that.

Q Weren't you occupying these quarters at Pinehurst on a required occupancy basis?

A Well, not in writing, but it was stipulated that my presence would be required at that place.

Q When you say we stipulated, you and who?

A My FCO, my fire control officer.

MR. NICHOLS: I have nothing further, your Honor.

THE COURT: Were you living with your wife and children when the nine people were moved in?

THE WITNESS: My wife was in the valley buying groceries. I had to call her to stay in the valley.

THE COURT: But she was residing there in the house with you?

THE WITNESS: Yes, sir.

THE COURT: What about the children, were they residing in the house with you then?

THE WITNESS: Yes, sir.

THE COURT: Now when was this, sometime before 1964 or—

THE WITNESS: I don't recall the exact year the Basin Fire was. I think it was around '60, '61, somewhere around there.

RECROSS EXAMINATION

BY MR. WATERMAN:

Q How long was your house occupied to where the [126] point you couldn't move your family back in?

A I would say a period of two weeks.

* * * *

HAROLD SEBRING, JR. called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

Q Would you state your name, please?

A My name is Harold Sebring, Junior.

Q And by whom are you employed?

A U.S. Forest Service.

Q In what capacity?

A As district ranger of the Hume Lake District of Sequoia National Forest.

Q And the Hume Lake District is headquartered where?

A At Pinehurst.

Q And in 1967 by whom were you employed and in what capacity?

[127] A U.S. Forest Service District Ranger, Hume Lake District, Sequoia National Forest.

Q So you have been at the same place ever since '67?

A Yes.

Q Have you had any experience—well, strike that. As district ranger, did you have any occasion to inquire as to whether at Pinehurst there was private rental facilities available?

A Frequently.

Q And what were the results of your inquiries in that regard?

A Sometimes yes; most frequently, no.

Q All right. During the periods of time when there were rental facilities available, did you make use of these facilities for assignments to your subordinates?

A Yes.

Q Would these assignments be for how long a period of time would these assignments be made?

A Well, it's an assignment in that when we had people transferring in that we would do inquiring to find out if they were available and then the employee would rent the facility themselves.

Q I see. The employee would rent it directly rather than the Forest Service renting it?

A Right, yes.

Q Did you—have you had any experience in connection [128] with interruptions by the public at the, at your quarters?

A Frequently.

Q And would you tell the Court what your experiences have been in that regard?

A Well, people come in there especially during hunting season from Los Angeles in the late afternoon and arrive at my doorstep at 3:00 or 4:00 o'clock in the morning for a camp fire permit and asking instructions, lost, where to go, on weekends frequently people come up asking for wood permits, land surveys, do I know houses are available for rent, places that are available for sale, the whole spectrum of questions.

Q Do you encourage this sort of thing?

A The government does and I don't negate it.

Q Have you had experience in connection with making improvements to the quarters?

A Yes.

Q And what have your experiences been in that regard?

A I don't know that I understand your question.

Q Well, have you in fact made or sought to make improvements in the quarters that you have occupied?

A That I have personally occupied?

Q Yes.

A No.

Q Have you had experience with any of your subordinates seeking to make such improvements?

[129] A Yes.

Q And would you tell the Court what happened in that regard?

A Well, what I have done in several cases in the examination of the homes finding them substandard that I have directed improvements to be made.

Q And have those improvements in fact been made?

A Yes.

Q And have those, did those improvements once they were made make the rental classification?

A No, they were absolutely minimum things that needed for comfortable living.

Q All right. These were the results of inspections of the facilities that you conducted?

A Yes.

Q How long have you been district ranger?

A Almost ten years.

Q And during that ten year period have you had any of your subordinates refuse you entry for the purpose of inspection?

A No.

Q Have you had experiences in connection with trailer occupancy for assignment?

A Yes.

Q What have your experiences been in that regard?

A You mean me personally?

[130] A Yes.

A I was moved into a trailer once.

Q And for how long did you stay?

A About a year.

Q And was this at your choice?

A No.

Q Why did you do it?

A I had been, a particular job that I was being promoted to and transferred to I was told at the time that my acceptance would also require that I live with another,—I'm a bachelor—and that I would live with another bachelor and that the house was a house that belonged to my position and therefore I would have to occupy it.

And there was a transfer of homes, the particular station that I moved to was being relocated because of the Trimmer River Project that is to go under water. The ranger advised me that when we moved to the new station that I would have to move into my own home, that that was a contingency of my employment.

Then he advised me that they were short a house so the FCO and I would have to occupy the same quarters, which we did. About a year later the FCO got married and I was told I would have to move out because that was not the best use of the house. And the only housing available, there was no private housing in the community or adjacent communities and the only housing that was available to me was a transit home, [131] and this particular transit home had neither heat nor lights in it at the time.

I was given a little less than two weeks in which to get it into living conditions on my own. And it took me about three months to actually get it in living condition.

While I was living in it it was necessary for me to bring power into it with a long extension cord and cook on an electric frying pan, and it was in the summertime so the heat wasn't too critical, but heat wasn't installed for a couple months.

Q I may have gotten lost. I think I thought we started out talking about your occupancy of a trailer.

A That's how I got in the trailer.

Q Because the transit home was unlivable?

A The transit home is a trailer.

Q Oh, I see.

A That's a trailer.

Q Have you had experience in moving people in and out of quarters?

A Yes, I have.

Q And have you—do you have a practice when moving people in and out of quarters concerning what period of notice you give them?

A I attempt to give them as much notice as I can. One of the things I try to do is be very careful before I move them in. I will even leave a residence vacant

for a [132] while rather than move a man in temporarily so that I don't have to move him out.

But the key factor to my moving people in is the benefit of the government.

Q Do you—again why do you give them as much notice as you can?

A Trying to be a nice guy.

Q Are you required by the government to give them any particular notice?

A No.

Q You told us about the public coming knocking on your door at the wee hours of your morning. Have you had any experience with the public concerning contacting you by telephone?

A Frequently.

Q And what's the general nature of this experience?

A We have an answering service that works out of Clovis and in the answering service there are five telephone numbers listed, personal telephone numbers, and these calls can come in any time of the night.

Prior to this time we had one telephone line or one phone for the station which there were five residences on the phone and this would ring into everybody's house and we not only had calls because it was a public phone, we not only had calls for the Forest Service, we also had calls for the National Park.

[133] MR. NICHOLS: May I have a moment, your Honor? I have nothing further, your Honor.

CROSS EXAMINATION

BY MR. WATERMAN:

Q Mr. Sebring, in 1967 you were district ranger of the Hume Lake District, is that correct?

A Yes.

Q And you resided at the Pinehurst Station?

A Yes.

Q And what type of home as far as size, number of bedrooms and so forth did you have in 1967?

A Three bedroom house.

Q You are a bachelor, sir?
A Yes.
Q And did you utilize all the space in that house?
A Yes.
Q And does that house have an office area?
A No.
Q It does not. Do you recall what rental you paid to the government in 1967 for that facility?
A No.
Q You do not?
A I don't recall.
Q What do you pay for that facility now?
A I'm not sure. The information is available, though.
[134] Q You don't know how much you pay for the house?
A No.
Q Okay. Now, you testified that in your district there were private rentals available from time to time and that your employees would seek those to rent those units, is that correct?
A Yes.
Q Now, how many government dwellings are there at Pinehurst or were there in 1967?
A Seven.
Q Seven. Did you ever have an occasion where you had an opening in one of those dwellings and you couldn't fill it with any of your employees?
A No.
Q In other words, if somebody were renting locally up there at a private dwelling and a vacancy came up and they were entitled to move into that dwelling you never had a problem getting them to move in there, did you?
A If they were entitled to move in?
Q Yes, sir, that's what I mean. In other words, I would assume a required occupancy would take precedence?
A Not a required occupancy by benefit to the employees of the service.
Q And beyond that why it was just a matter of first come first serve or your discretion?
A Yes.

[135] Q Is it a fair statement that those seven dwellings have been occupied by government personnel continuously, and I mean other than for temporary vacancies, people moving in and out ever since you have been up there?
A Yes.
Q Do you know any of the rents that are being paid up there at this time?
A I don't know them offhand. I'm sorry.
THE COURT: Do you know about what they are?
THE WITNESS: I would have to guess. The information is available.
MR. NICHOLS: I'm going to be putting testimony on on that.
THE COURT: All right.
Q BY MR. WATERMAN: Do you know of any case of any employee under your direction at Pinehurst who has quit or left the service because he was moved out of a particular quarters?
A No.

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[137] ANGELO LEVAGNINO, JR. called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

Q Would you state your full name, please?
A My name is Angelo Levagnino, Junior.
Q And by whom are you employed?
A I'm employed by the United States Forest Service.
THE COURT: Would you spell your last name, please?
THE WITNESS: Yes. It's L-e-v-a-g-n-i-n-o.
Q BY MR. NICHOLS: And in what capacity are you employed by the service?
[138] A I am an administrative officer in the Sierra National Forest.
Q And were you in this position in 1967?
A Yes.

Q All right. You are familiar with the individual plaintiffs from the Sierra National Forest who are involved in this action, are you not?

A Yes, I am.

Q All right. Would you tell us—well, I'm going to read the names of the plaintiffs who were in 1967 occupying quarters in the Sierra National Forest.

Would you tell us off each name where those individual plaintiffs quarters were located. The first one is Paul Meischke.

A Mr. Meischke was located at Trimmer.

Q All right. I think with each individual plaintiff I will also at the same time ask you to tell the Court the amount of bi-weekly rent that the individual was paying in 1967.

A Mr. Meischke in 1967 was paying $23.50.

Q All right. Donald J. Cooley.

A Mr. Cooley's station at that time I believe was Music Creek which is on the Pine Ridge District.

Q And how much was he paying?

A According to my records he was paying $14.50.

Q Robert N. Thompson?

[139] A Mr. Thompson was at Big Creek and was paying $21.50.

Q I'll show you Plaintiff's Exhibit 4 which is a map of the Kings River District. Now, is Big Creek in the Kings River District?

A No. This would be the Pine Ridge District.

Q I see. Mr. Kendall, Herbert J. Kendall?

A Mr. Kendall was at Trimmer and was paying $23.50.

Q And Trimmer is on the Kings River District?

A Yes.

Q Mr. Charles Goughnour?

A Mr. Goughnour was at Big Creek and paying $21.50.

Q Mr. Joel M. Criswell?

A Mr. Criswell was at Big Creek and paid $16.50.

Q Mr. Levagnino, I'll show you a map, U.S. Department of Agriculture Forest Service entitled Pine Ridge and Minarets District.

Now, would you point out to us where Big Creek was located and if we can have the marking pencil, your Honor. Would you mark the location of the Big Creek Station with a, we've already had an L-1 for Mr. Luna.

THE COURT: Make this one AL-1 then.

THE WITNESS: AL-1.

Q BY MR. NICHOLS: All right. I'm sorry, I'll have to go back with you. Mr. Donald Cooley was located where?

A I believe it was Music Creek Guard Station.

[140] Q And does that show on the map?

A Yes.

Q Would you mark that with an AL-2, please. And then all the others we have gone through were either at Big Creek or Trimmer?

A Correct.

Q All right. I think the last name that I asked you about was Mr. Criswell?

A Yes.

Q All right. And did you tell me where he resided and how much rent he was paying?

THE COURT: Yes, he did, Big Creek, $16.50.

Q BY MR. NICHOLS: All right. The next individual is Richard L. Nichols.

A Mr. Nichols was stationed at Trimmer and he was paying $23.50.

Q The next one is William P. Cook.

A He was at Trimmer and was paying $18.00.

Q The next one is John R. Boswell.

A I believe, my records aren't clear here, but I believe Mr. Boswell was at Big Creek and he was paying $10.00.

Q Next one is F. Weldon Sharp.

A Mr. Sharp was at Trimmer and was paying $23.50.

Q The next one is Frank E. Crane.

A Mr. Crane was at Trimmer and was paying $10.00.

Q And the last one from the Sierra National Forest

[141] was Robert Zwirtz.

A Mr. Zwirts was Trimmer and was paying $14.50.

Q All right. Do your records reflect whether the occupancy of any of the individual whose names we have just discussed was a required occupancy?

A Yes, they do. Although at that time this point in time I have to admit that our records are somewhat incomplete in that we have a records disposal schedule which calls for disposition of records after certain times, but I was able to reconstruct some of the data in response to your question.

Q Who were the individuals who had required occupancy?

A Mr. Thompson, Mr. Criswell, Mr. Cooley, Mr. Meischke, Nichols and Cook.

Q All right. Mr. Levagnino, you were present in Court yesterday and heard the testimony of Mr. Mitchell. Were there any portions of Mr. Mitchell's testimony that did not accurately reflect conditions as they were run on the Sierra National Forest in 1967?

* * * *

[142] A Yes. In answer to your question the best of my knowledge, the application and the implementation of the rental quarters in the Sierra I believe looking back to that time and since has been consistent with the policies and regulations as explained by Mr. Mitchell yesterday.

MR. NICHOLS: Fine. Thank you. I have nothing further, your Honor.

CROSS EXAMINATION

BY MR. WATERMAN:

Q Mr. Levagnino, do your records indicate the length of residence in these government quarters prior to 1967 and in each of the individuals that you have testified?

* * * *

[143] THE WITNESS: Yes, in answer to your question, I don't have that information here. I think the only, I guess we would have to reconstruct that information by going back to the individuals involved and asking them to give us that kind of information because again our records just—well, for one reason is that over the years some of them have changed from one dwelling to another dwelling.

* * * *

[144] EDWIN W. LINDSEY called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

Q Mr. Lindsey, would you state your full name, please?

A Edwin W. Lindsey. That's spelled with s-e-y.

Q And by whom are you employed and in what capacity?

A By the U.S. Forest Service on the Sequoia National [145] Forest as an administrative officer.

Q And were you employed in that position and function during the year 1967?

A Yes, I was.

Q All right. I am going to read to you as I did with Mr. Levagnino the names of those plaintiffs in this action who were occupying quarters in the Sequoia National Forest, and I will ask you, one, to tell me where those quarters were located and, two, to tell me what the bi-weekly rental deduction from their paychecks was.

First one is Paul Spivey.

A Mr. Spivey was living in quarters at Pinehurst and the deduction was $14.50 a pay period.

Q Thomas Adams?

A Mr. Adams was living in Pinehurst. His deduction was $14.50 a pay period.

Q Jessie R. Luna?

A Mr. Luna was living at Pinehurst. The deduction was $14.50 a pay period.

Q Lawrence L. Cabodi.

A Mr. Cabodi was at Pinehurst. The deduction was $14.50 a pay period.

Q Harold F. Sebring, Junior?

A Mr. Sebring is living at Pinehurst. His deduction was $16.50 per pay period.

Q All right. Now, you were present during the testi- [146] mony of Mr. Mitchell yesterday. Was there anything in his testimony that did not accurately re-

flect the practices and procedures in effect in 1967 in the Sequoia National Forest?

A No, we followed those guidelines.

MR. NICHOLS: I have nothing further, your Honor. Wait—may I have a moment?

Yes, I have nothing further of Mr. Lindsey.

THE COURT: Were any of these under required housing?

Q BY MR. NICHOLS: Oh, yes, Mr. Lindsey, would you respond to that?

A Yes, your Honor.

Q Who were the individuals who were under required housing?

A Mr. Jessie Luna and Mr. Tom Adams.

Q Just those two?

A Yes, sir.

MR. NICHOLS: All right, that's all, your Honor.

CROSS EXAMINATION

BY MR. WATERMAN:

Q Mr. Sebring was the district ranger at that time?

A Yes, sir.

Q And he wasn't required to live on that station?

A No.

Q Now, Mr. Lindsey, do you have records or independent knowledge in each of the cases the individuals to which [147] you testified as to their period of residence in those houses prior to 1967?

A I have personal knowledge of Mr. Sebring because he, I am reasonably sure he transferred to Pinehurst in January of 1967.

The other people I do not have that information with me, but I believe it would be available from the records as to prior residence.

* * * *

MR. NICHOLS: * * * At this time I will move into evidence the Pinehurst and Minarets District map that Mr. Levagnino testified in connection with.

THE COURT: All right, it will be received as Plaintiff"s Exhibit next in order, No. 6, Exhibit 6 in evidence.

(Whereupon, Plaintiff's Exhibit No. 6, a map, was received into evidence.)

* * * *

[148] MR. NICHOLS: I would ask Mr. Waterman at this time for a stipulation that the assessments made as to each of these individual plaintiffs were based on the use of the imputed income rather than actual income for capitalization of income purposes.

* * * *

[153] THE COURT: Now, so do you agree, Mr. Waterman, that the method of determining the value here was a capitalization of income and that it was a capitalization of income based on imputed rent rather than actual rent?

MR. WATERMAN: Yes, this is a fact.

* * * *

[154] THE COURT: All right. Well, then do you agree with the stipulation then?

MR. WATERMAN: Yes.

THE COURT: All right.

MR. NICHOLS: Thank you.

THE COURT: And the only conditions being those that you stated that you are not conceding that this is material.

MR. WATERMAN: That's correct, sir.

* * * *

[172] PAUL CONWAY called as a witness by and on behalf of the Defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WATERMAN:

Q Would you state your name and occupation, sir?

A Paul Conway. I'm chief appraiser for the Fresno County Assessor's Office.

Q How long have you held such position?
A I've been chief appraiser since 1964.
Q And how long have you been employed by the Assessor's Office?
A Been employed by the Assessor's Office a little over twenty years.
Q And in what capacities prior to 1964 were you so employed?
A I was employed as an appraiser beginning in 1951 as an assistant appraiser and then went through the ranks of an appraiser, senior appraiser, supervising appraiser and to my present position as chief appraiser.
Q And during the course of your career with the County you had experience I take it in appraising and assessing all the forms of property that is within the realm of your office, is that correct?
[173] A Yes, I have.
Q Now, you know when Fresno County first started assessing personal, possessory interest as such?
A No, I can't say when they first began assessing possessory interest as such. Possessory interests were assessed when I first came to the office in 1951.
Q I see. And can you tell us when possessory interests of employees of tax exempt lands who resided on such lands in quarters furnished by the employers were first assessed?
A To my knowledge the first year in which such assessements was made was in 1967.
Q And can you tell us what caused your office in that year to commence assessing such interests?
A We were advised by the State Board of Equalization through the assessment standards division of the Mc Caslin versus De Camp case with a brief on that case.
We solicited information from other assessor's offices and from our county counsel were advised by our county counsel that this piece of property was legally subject to taxation.
Q And now when you say you had the opinion of the county counsel, you're referring to the plaintiffs which are involved in this case, is that correct?

A Referring to the office of Mr. Wash, the Fresno County Counsel.
Q Yes, but in that regard as far as the United States [174] Forest Service employees in renting quarters on Forest Service land, is that correct?
A Yes, this is one of the types of property that we asked questions of the county counsel. We were inquiring about all types of housing furnished by governmental employers.
Q I see. And so you assessed other employees or other occupants of tax exempt property in similar manners as you did the U.S. Government employees, is that correct?
A Yes.
Q You referring to a Communication State Board of Equalization, Mr. Conway, and I will ask you if that is a copy of the letter and the materials which you were sent?
A Yes, it is. It has my initial on it.
Q To identify it further for the record, it's a letter from the, from Jack Eisenhower, Chief Standards Division, dated March 17, 1967 to which is an appended opinion in the case of Mc Caslin versus De Camp, is that correct?
A That's correct.
MR. WATERMAN: May we offer this into evidence, your Honor?
MR. NICHOLS: I will stipulate it will go in, your Honor.
THE COURT: All right, it will be Defendant's Exhibit A.

(Whereupon, Defendant's Exhibit A, a letter, was received into evidence.)

Q BY MR. WATERMAN: Now, once your office made this [175] decision to assess this specie of property, would you tell the Court what contacts you made with governmental agencies in order to gain sufficient information to allow you to make such assessments?
A Yes, we prepared a form letter and sent it to all governmental agencies which we were aware, including

the U.S. Forest Service, Bureau of Land Management, state agencies, local cities, school districts, irrigation districts. This letter—

Q I handed you a form letter. Is that the letter you referred to?

A Yes, this is the letter we used in 1967 and we asked for the name and mailing address of each occupant of government owned housing and other information.

Do you want me to itemize these?

Q No. I think it will speak for itself. May we offer this into evidence, your Honor.

MR. NICHOLS: Stipulate it into evidence, your Honor.

THE COURT: All right, Exhibit B.

(Whereupon, Defendant's Exhibit B, form letter, was received into evidence.)

Q BY MR. WATERMAN: Now, in connection with the instant case, were such letters sent to the local offices of the Sierra National Forest and also the Sequoia National Forest?

A Yes, they were.

Q And did you receive any written replies to your [176] letters?

A We received a written reply in the case of the Sierra National Forest. I believe it came through the office of William Anderson.

Q I show you a copy of a letter dated May 4th, 1967 signed by William L. Anderson. Is this the letter to which you refer?

A This is correct. He was acting regional attorney. The information that we requested was attached to the letter in form of a listing of the employees in the Sierra National Forest.

Q Now, I note there seem to be some additional writings other than the typed material on there and other than the signatures.

Do you know the source of that writing? Who put that in?

A Yes, this was put in by our office.

Q I see.

A We itemized the partial numbers and made other notations as we processed the property.

Q And this was substantially the information that you had asked for, is that correct?

A Yes.

MR. WATERMAN: May we offer this?

MR. NICHOLS: Stipulate it into evidence, your Honor.

THE COURT: Very well, it will be received as Exhibit C.

[177] (Whereupon, Defendant's Exhibit No. C a letter from William Anderson, was received into evidence.)

Q BY MR. WATERMAN: Now, in connection with the Sequoia National Forest, did you receive a writing similar to that from Mr. Anderson at your request?

A No, we did not. In case of the Sequoia National Forest, they were contacted by phone. I can't recall at this time whether they contacted us and told us that they didn't have the staff to compile the information we wanted or whether we contacted them when they failed to respond to our previous correspondence.

But, at any rate we contacted them by phone, received the information over the phone and tabulated it in our own hand.

Q I show you—it has Exhibit D on it which is not relevant to this question, but does this represent a tabulation of someone in your office as to the information they received from Porterville concerning Sequoia employees?

A Yes, it does.

MR. WATERMAN: Very well. May we offer this?

MR. NICHOLS: That one I would like to remain for identification for the moment, your Honor.

THE COURT: All right, it will be marked Exhibit D for identification.

(Whereupon, Defendant's Exhibit D, [178] a tabulation, was marked for purposes of identification.)

Q BY MR. WATERMAN: Now, having received this information from the two national forests involved,

what next did your office do in order to appraise these possessory interests?

A Well, we visited, or one of our staff visited each of the individual locations indicated and made a record of the type of structure that was involved in the area of the structure that was utilized for private living quarters.

We gathered all the information we could in this regard, contacted people that were available in both the Sequoia and Sierra National Forest Offices.

Q So subsequent contacts other than your original contact were made with the Forest Service Offices, is that correct?

A Yes.

Q Now, in a typical case, and I don't—let me ask you this: was the appraisal method used by your office substantially similar in each case?

A Yes, it was.

Q All right. And would you tell the Court how that appraisal was conducted, what was done, what calculations or formulas were used in the typical case in order to arrive at an assessed value of this possessory interest?

A We made some surveys of the general areas to try to determine the, what we call the economic rent of the individual [179] properties involved. Then we made a determination of the value of the properties occupied by the government employees.

THE COURT: The value of the property itself you mean as opposed to the possessory value?

THE WITNESS: Yes, the value of the property itself as of the date of the appraisal which would have been March 1, 1967.

And the value of the reversion after one year period.

Q BY MR. WATERMAN: And is this part of the capitalization of income approach to the property?

A It's connected with it. We used the reversionary approach as an allocation between land and improvements.

Q Why did you do that?

A The law requires that the assessments are placed separately on land and improvements and this we feel

applies also to possessory interest in land and improvements.

Q In other words, when you determined economic rent that includes both the value of the rental of the improvements and the underlying land, is that correct?

A That's correct.

Q So in order to apportion or allocate you use the reversion method to do this, is that right?

A Yes.

Q And in these cases—well, strike that. I assume in order to arrive at a capitalization of income for purposes of determining present worth on a particular date you have to [180] use a term of time over which that rent is spread, is that correct?

A Right.

Q And in what, in what period of time did you utilize in these cases?

A In these cases in the Sierra and Sequoia National Forest we used a period of time of one year.

Q Would you tell the Court why that period was used?

A That we did not have a tabulation of the history of the movement of the tenants involved in this type of property. We were aware that many of the tenants had been there for a period of years.

It seemed appropriate to us at the time to use a one-year term as a rather conservative approach to the valuation of this type of property, feeling that there was a reasonable probability that this would be a minimum term that any of the employees would actually be occupying the property, that they would have at least one year's term before them.

Q Right. And along those lines in order to determine what comparable rentals were renting for in the areas you've described, how would your appraisers obtain this information?

A The appraisers at that time were working in the area of this type of property. We had appraisers working in the Shaver Lake area, Hume Lake area and Huntington Lake area and they familiarized themselves with the rentals of private properties in these areas, made

adjustments to these rentals [181] so that they could be applied to the government housing furnished.

They also took into consideration the type of use which was allowed by the government, the facts that there were many restrictions on the homes that were occupied by governmental employees such as has been brought out in previous testimony about the twenty-four hour on call type duty that the employees were involved with.

Q And, as a matter of fact, didn't—at least some of your appraisers actually reside in these areas during the period these appraisals were being made?

A Yes, some of our appraisers had actually rented cabins in the areas because they were working up there for generally the whole summer.

Q Okay. Now, in considering the value of a particular Forest Service quarters as compared with the rental income from say a private cabin in the area, was any adjustment made for the fact that not all of the Forest Service cabin would be devoted to personal use of the occupant?

A Yes, we considered only the area occupied as living quarters. We excluded the area of office or other obvious governmental areas that were open to the public.

Q All right. Now, once an imputed rent to a particular government quarters had been determined, how was the assessment arrived at for that particular quarters?

A The rent was then, or imputed rents were on a monthly [182] basis. This was multiplied by twelve to give an annual rental figure which was then discounted for a one-year period in discounting this rent or capitalizing the rent I think is the proper appraisal terminology for a one-year period. We took that into consideration, the present worth of that income stream for one year. This involved a, what we call a present worth factor.

Q And did you use a percentage rate in order to arrive at this?

A Yes.

Q And what percentage rate was used?

A We used a percentage rate of ten percent in 1967 for this type of property.

Q And why was that rate used?

A It was based upon the going return rates for similar investments included in allowance for taxes and it also included allowance for the type of property that was involved, that is the government service employee and some of the risks that were involved that he might be terminated, his employment might be terminated so there was a risk allowance, a tax allowance and a yield rate involved.

Q I see.

THE COURT: I missed a little bit of your testimony there, I guess, when you first started talking about this. These things were already ground into the rental that you determined before you used this ten percent capitalization rate, weren't [183] they?

THE WITNESS: Yes, as far as the adjustments that were made to the economic rents we found in the area to apply those to the government housing, yes, we considered many of these factors.

THE COURT: Yes, and then after you found the economic rent you capitalized it with this rate?

THE WITNESS: That's correct.

Q BY MR. WATERMAN: All right. Then as a result of this capitalization at this rate you arrived at a figure which represented the present worth to that tenant of both the improvements that he occupied and the land on which they resided, is that right?

A Yes, the possessory in the land and improvement.

Q Right. Now, when you arrive at that figure were there any other, was that the actual assessed figure or were there any other adjustments made at that point?

A No, this was not, this was merely a mathematical computation that gave us an indicator of value.

Q Did you utilize, did you or your office utilize any other indicators of value?

A Yes, as I had stated, we utilized—it's called the reversionary technique which is closely akin to the capitalization of income in that you would consider the present worth of the property as of the appraisal date less the present worth of the reversionary interest to the [184] government at the end of the one-year period.

Q I see. And in all cases would those two figures be the same necessarily?

A No, they were not.

Q They would give you a range of values, is that correct?

A Yes.

Q A high and a low or some difference—

A This would normally be the case, yes.

Q And what techniqur [sic] or what calculations were used to arrive at an ultimate assessment value?

A This was a judgment factor that was arrived at by the appraisor himself. There is no special formula or spelled out derivation, mathematical method of arriving at a judgment of value. This is something that the appaiser has to do on his own.

Q Can you tell us what considerations the appraiser was instructed to use and did use in arriving at the ultimate assessment figure?

A I think the considerations would be similar to those that I have already outlined considering the type of property and the type of use to which the property was put.

In general I would say if there was any advice given to the appraiser it would have been to the, on the rather conservative side knowing the conditions that were involved.

Q And you and your appraisers were aware at the time [185] you were making these appraisals that the tenancy by these individuals could be terminated at the will of the government, is that correct?

A Yes, we were fully aware of this fact.

Q And were you also aware that in making your appraisal and assesment that these quarters were often times subject to frequent call by the public in these quarters?

A Yes, this was obvious, as was stated in previous testimony often signs indicating if the ranger was not in the office to contact him at cabin such and such in the back, so it was obvious that they were available for these other purposes.

Q Now, in some of the employees cases, they were provided—an employee was provided actually two government quarters in which he resided at different times of the year, is that right?

A Yes.

Q Now, did you assess that, such employees on the basis of the entire year in both—that's a bad way to put it.

Did you make an assessment for each such quarters in that employee's—

A No, we did not.

Q How did you handle that situation?

A We took the preponderant place of residence in the case, to be specific, in the case of the people at Trimmer that [186] moved up to Dinkey Creek for the three or four months during the summer. We took the Trimmer location as being their primary place of residence and merely capitalized the value at the Trimmer location.

Q I see. Now, were you aware that the amount of rent actually being paid by the individual employee to the government was in most, if not all cases, different from your imputed economic rent?

A Yes, in the case of the Sierra National Forest we were aware of this because the letter that has been introduced from William Anderson included the rental structure that had the bi-weekly rent shown on it.

In the case of the Sequoia National Forest my records do not indicate that we had the actual rentals paid at that time.

Q All right. And can you tell the Court why the actual rentals being paid by the individual employee was not used in the assessment of their possessory interest?

A We felt that the method in which these rentals were determined were probably from on the basis of governmental regulations which did not necessarily meet the economic conditions of the actual areas involved.

The indications that we had from our own rental survey in these areas were that they were generally considerably below what we felt to be an economic rent.

Q I see. And in your understanding of the operation [187] of the Assessor's Office, is this a proper method of determining assessed value on such property?

A Yes. It's proper and the method that is prescribed by appraisers in general would be to determine economic rents and it would be very rare that you would use actual contract rents on any type of property whether it be possessory interest or fee owned property.

The economic rent concept is one that is used throughout the appraising profession.

Q Now, as far as the term that you used in 1967 to apply the capitalization to, would you have used a different term if there had been a written lease for a specific term between the government and its employees?

A Yes, we would have used the actual remaining term of the lease at that time.

Q But since as you understood there were no documents between the government you, I think you have already explained why you chose even a one-year period.

A We estimated a term we felt the tenant would remain.

Q All right. Was your office aware at the time these appraisals were made that these individual employees could be dispossessed at any moment say in an emergency situation for a fire station and so forth?

A Yes, we were aware that the government had complete control of the tenancy and could move them out for whatever reason.

[188] Q And was this factor reflected in the ultimate assessment amount?

A Yes, this is one of the factors that we considered in arriving at an economic rent of the property.

Q Mr. Conway, I'll show you a document of two pages and ask if you are familiar with that?

A Yes, I believe this is an answer to some of the questions on the interrogatory.

Q Yes. Was that prepared by your office in, as a result of a request for this information?

A Yes.

Q All right. And just briefly would you—there are some figures which I think relate to the question of the interrogatory, but in going across the first name, would you tell the Court what the figures do represent in each case?

A The first name is Paul Neischke and the first column is a tax area code which would indicate the tax rate area applicable to this particular property. The second would be the account number which in 1967 was the tax collector's method of billing the property.

The next column is the assessor's parcel number. I'l; [sic] have to refer to the questions asked for these others.

Q Right, I understand.

A It has column—is it imputed rent, the rent that we imputed from the Assessor's Office.

Q I think I can represent to you that 2-C was the [189] interest being valued or being assessed which was a possessory interest in each case, is that correct?

A That's correct.

Q And 2-1 or 2-C asked for the location of the residence being assessed?

A Yes, that appears to be correct.

Q And 2 C-3 I believe represents the assessed value that you found on that residence, assessed value of the possessory interest?

A Could I refer—

Q Go ahead and refresh your recollection.

A Yes, that's correct. 2 C-3 would be the total assesssed value of the individual property by the possessory interest.

Q And 2 C-4 which I believe is zero in each case?

A Question on 2 C-4 is the amount assessed to other persons if any and the name and address of each such person.

Q All right. And the imputed rent, the last column for each is the actual imputed rent that you used in performing the calculations that you have testified to?

A That's correct.

Q And in M I understand stands for the monthly rent?

A That's right, imputed rent on a monthly basis.

MR. WATERMAN: May we offer this, your Honor?

MR. NICHOLS: No objection, your Honor.

THE COURT: Would it be agreeable if I just write in on [190] monthly basis on this exhibit?

MR. WATERMAN: Yes, sir.

MR. NICHOLS: That is what the dash M stands for?
MR. WATERMAN: Yes.
THE WITNESS: Per month, yes.
THE COURT: All right, in my handwriting I have written in on monthly basis. This would be received as Defendant's Exhibit next in order, E.

(Whereupon, Defendant's Exhibit No. E, was received into evidence.)

Q BY MR. WATERMAN: And I take it—but I want to make it clear if I can, none, —in none of these cases was the value of the underlined fee being assessed, is this correct, sir?
A That's correct.
MR. WATERMAN: I believe those are all the questions I have, your Honor.
THE COURT: Very well.

CROSS EXAMINATION

BY MR. NICHOLS:

Q Mr. Conway, there does not insofar as I can tell from looking at colums 2 C-3 and the imputed rent column, there does not appear to be any particular correlation between those two figures, is there?
A The only correlation would be that the imputed [191] rent was what was used in the capitalization approach as an indicator of value.
Q Well, for example, looking at—let me see if I can find a good example. Looking at Mr. Meischke, I see a valuation of the possessory interest of two-hundred nine and an imputed rent of $65.00 a month.
Looking at Mr. Goughnour I see a valuation of the possessory interest at a hundred fifty-four which is a lower figure but an imputed rent of $85.00 a month which is a higher figure.
A Uh-huh.
Q Now, will you explain that?
A I have to refer to the appraisal records themselves if I may.
Q Fine.

A In the case of Mr. Meischke's computed rent that was used was $65.00 a month. This gave us an indicated value of $710.00.
Q That's sixty-five times twelve?
A Well, following it through, sixty-five times the twelve would have been $780.00 per year times a point nine one discount factor, that would be the present worth of one in one year at ten percent discount.
So that would give us an indicator value of $710.00 using the computed return method. The reversionary interest of the land was found to be—the present value of the [192] reversion was thirteen fifty as compared, this is in land, of thirteen fifty as compared to the fee value of the land possessed of fifteen hundred which would give an indicated possessory interest value of a hundred fifty dollars for land.
And the improvements, the reversionary value, the present worth of reversion was $9,480.00 as compared to the fee value rights possessed of $10,420.00, a difference being $940.00 as indicator of the possessory interest in improvements.
The summation of the one-hundred fifty land, the nine-hundred forty improvements would be a thousand and ninety dollars as compared to the $710.00 derrived from the imputed return method.
In the judgment of the appraiser, his final total possessory interest value was $950.00 in this case. In the case of Mr. Goughnour—
Q Well, before we get to Goughnour, and then the $950.00 was divided by twenty-two percent to reach this two-o-nine figure?
A The nine-hundred fifty would have been multiplied by twenty-two percent to get the $209.00.
Actually an allocation was made to possessory interest in land and improvement, the nine-hundred fifty was broken as a hundred fifty possessory interest in land, $800.00 possessory interest in improvements and I believe at that time separate calculations were made.
[193] The twenty-two percent was multiplied times the one-hundred fifty times the eight-hundred and then the summation of that would be the two-hundred nine entered on the role.

Q Okay. Now, would you tell me about the same things with regard to Mr. Goughnour pointing out why you start higher and wind up lower?

A In case of Mr. Goughnour the imputed return method based upon the economic rent was $85.00 times the twelve months times the same .91 factor gave us an indicated value of $928.00.

The reversionary interest in the land was indicated at $1,360.00. That's the present worth of the reversion. The fee value of the land with the right to possession of land was $1,500.00, the difference being $140.00 as an indicated possessory interest value in land.

In the case of the improvements, the present value of the reversion was fifty-four forty compared to the fee value of the rights possessed of fifty-nine eighty leaving a preliminary possessory interest value and indicator value of the buildings of $540.00.

The summation of the one-hundred forty in land and the five-hundred forty indicated possessory interest value and improvements would have been $680.00 as compared to the imputed return method of $928.00.

The appraiser in his judgment in this case came up with a total possessory interest value of $700.00, of which a [194] hundred fifty were allocated to land and five fifty to improvements.

Q Well, I'm sure that you have told me in your testimony but frankly it went right past me where was—where did you get from a lower imputed rent to a higher possessory interest value in Meischke's case as opposed to Goughnour?

Can you tell me without bombarding me with the figures?

A Perhaps I can just summarize that in Meischke's case. We had an indicator value from the computed return method of seven-hundred ten as compared to an indicator value by the reversionary technique of $1,090.00. So there was a range of value from seven-hundred ten to a thousand and ninety.

The appraiser in his judgment picked the figure of $950.00.

Q I'm with you on that.

A In the case of Goughnour the range of value was $928.00 on the computed return method as compared to the $710.00 on the imputed return method on Meischke.

In other words, the computed return method gave a higher figure in the case of Goughnour.

Q Right.

A However, the reversionary technique gave a lower indicator value, and indicator of $680.00.

Q All right. Now, let me go into that. If I recall your figures correctly, and I'm not at all sure that I do, [195] my recollection is that the Meischke reversionary figures totaled a hundred fifty dollars and the Goughnour totaled $140.00.

A That was in land only. The indicated possessory interest value in land.

Q All right. Then I take it there was a substantial difference in the reversionary interests in the improvements?

A That's correct, nine-hundred forty in the case of Meischke compared to five-hundred forty in the case of Goughnour.

Q All right. What would the reason for that rather extreme difference have been?

A Well, it was the appraiser's judgment of the value of the improvements involved.

Q Well, would it be fair to—

A I could cite that the Meischke residence according to our records contained some fourteen hundred square feet as compared to nine hundred eighty on the Goughnour residence.

This is not the sole criteria, but this was one of the factors that was considered.

THE COURT: Let me interrupt. Would this—I don't want to stir up any trouble among governmental employees, but wouldn't this be an indication that from your standpoint that Mr. Goughnour was paying more rent to the government than he should have been paying, either that or Mr. Meischke, this is by their own standards, either that or Mr. Meischke [196] was paying less than he should have paid.

THE WITNESS: Well, of course—

THE COURT: Because isn't the difference the fact the computed rent is much higher in the case of Goughnour than it is of Meischke and the computed rent is based on, —no, just the reverse, isn't it?

THE WITNESS: Well, the computed rent is based upon our own observations of rentals in the area, not necessarily related to what they actually paid.

I don't know what the relation is between the actual rental payments that was derived from the government.

THE COURT: I see, because you didn't take that into consideration at all, did you?

THE WITNESS: No, we did not. Now, it may be that in perhaps we imputed too high a rent on Goughnour. All I can say is this is the final judgment of the appraiser he came up with nine hundred fifty on one and seven hundred on the other. I don't know what went on in his mind. His thoughts are not all recorded.

Q BY MR. NICHOLS: And really on all of these the only thing that you are really able to tell us on any given appraisal is the procedure that was used and the figures that appear on the records and that there was a judgment factor that the individual appraiser used and you don't know what the nature of that exercise of judgment would have involved?

A That's correct.

[197] Q Is that fair?

A Yes.

THE COURT: And also now with respect to that, wouldn't it be true that the Court wouldn't be asked to second guess the appraiser, that wouldn't be part of this case?

MR. NICHOLS: I certainly would not want to do that, your Honor, right.

THE COURT: All right.

MR. NICHOLS: All right. Mr. Conway—may I see exhibits, Exhibit A, your Honor?

(Whereupon, Exhibit A was handed to Mr. Nichols.)

Q Mr. Conway, referring to Defendant's Exhibit A, did you—well, strike that.

Did you make the decision that Fresno County Assessor's Office would go ahead and start assessing possessory interests against governmental employees in 1967?

A The final decision was made by Mr. Gard, the County Assessor.

* * * *

[202] Q All right. Now, Exhibit F, the letter that you received from Max Robinson I would like you to read the first sentence of the last paragraph to the Court, please.

A (Reading) "It is difficult to imagine in an employee housing situation that the employee would not have exclusive possession at least during the time he is paying rent."

Q All right. Now, what was your understanding of what that sentence meant?

A That the employee could occupy this premise as his own home and treat it as such.

Q Well, did that sentence mean to you that any time an employee occupied government housing it would subject him to a possessory interest tax no matter what the elements of that occupancy were?

A There would be other criteria to be considered as to what type of housing it was. For instance if it was a trailer, which is classified as personal property and not subject to possessory interest in California, it would not.

Q Okay. Let's leave the trailer exception out. Other than that—

A If it was a barracks type dwelling where individuals were sharing the unit with other individuals in a barracks situation, I merely mentioned barracks as a type of situation, we would not have considered that, any of the individual units would be subject to possessory interest in that case.

[203] Q Okay. I'll come back to the barracks situation in a bit. Leaving that exception aside, would it, would that sentence of that letter indicate to you that aside from barracks facilities and trailers that any employee occupancy of government quarters created a possessory interest?

A If this occupancy was on the basis that is indicated in the letter that this employee has the right to occupy

this specific area and specific quarters himself or his family, yes.

Q All right. So your answer to my question is yes?

A Yes.

Q Thank you. Now, you mentioned, Mr. Conway, that you would not have assessed barracks quarters and did not assess barracks quarters.

You were aware, were you not, that there were Forest Service employees occupying barracks facilities in Fresno County?

A Yes.

Q And you did not assess those?

A That's correct.

Q Now, did you have any understanding or knowledge concerning whether there was any difference in the occupancy relationship between the individual employee and the Forest Service of the persons occupying barracks as opposed to the persons occupying, for example, two or three bedroom homes?

THE COURT: Would you read that question back? I think [204] it's a clear question, but I was making some notes and didn't get it. So rather than have you state what sounded to be clear, I will have it read.

MR. NICHOLS: I don't know I could state it again.

THE COURT: I thought it might be a little hard, so read it back to me, please.

(Whereupon, the question on page 204, lines 21 thru 25, was read by the Reporter.)

Q BY MR. NICHOLS: Do you understand my question?

A I believe so. I don't believe we had any indication that there was any difference in the relationship between the employee and the government.

The government still controlled who went to what housing area and still controlled the time that they might be there, had the right to move them out, whether it would be a barracks or housing.

Q So, so far as you were aware the relationship was the same?

A I would say between the government and the employee.

Q Between the government and the employee?

A Yes.

Q Then why was it that you did not assess employees occupying barracks facilities?

A Because the employee did not have exclusive possession of that area for his own use and the family. He had to share [205] it with others.

Q All right. Now, you used the words "that area". What are you referring to when you use the words "that area"?

A The area of the living quarters involved.

Q Well, did not the individual employee in a barracks have under your definitions at the very least exclusive possession of the bed he slept in?

A Probably. I don't know.

Q And the square footage that he occupied within the barracks?

A I'm not personally aware of the provisions that the individuals had between each other in a particular barracks situation, whether they had cubicles or just a bunk or a bed and shared a common eating and living area.

Q Well, let's say had there been cubicles, would you have considered that a subject of assessment?

A Probably not unless they were cut so clearly defined as to be apartments, separate where there was definite separate entity involved.

Q Well, that can be kind of a fine line I would think. Would you require four walls to the ceiling and a door before you would consider them as apartments?

A I probably would, yes.

Q And if the walls, for example, stopped a couple feet below the ceiling you would say it was not in possessory?

A Not having run into that situation, I couldn't really [206] say. I would have to consider it.

Q Okay. But in any event you did understand that the relationship of the people in the barracks to the Forest Service was the same as the relationship with the people occupying the two and three bedroom houses?

A Yes.

• • • •

[209] THE COURT: Would you resume the stand, Mr. Conway.

THE WITNESS: Yes.

Q BY MR. NICHOLS: Mr. Conway, showing you Defendant's Exhibit D for identification, this is the sheet that was prepared in your office from the telephone call from someone in the Sequoia National Forest, is that right?

A Telephone call between our office and the forest, I don't know who originated the call.

Q Do you know who gave the information to the person in your office who took it down?

A No, I did not. We failed to note the name of the party that was contacted.

Q All right. Do you know who in your office took the information?

A Yes.

Q Who?

A The initials would indicate Bill Greenwood.

Q Okay. Now, there are some names, towns and what appear to be assessment parcel numbers, am I correct on that?

A That's correct.

Q And then there are references to cabin numbers and to Pinehurst RS, ranger station?

A I would assume that would be Pinehurst Ranger Station, yes.

[210] Q There's a name here, Lory, do you know what that refers to?

A Let me check the records. It's probably a subsequent owner or subsequent occupant to the cabin.

Q I see.

A I can check it in just a moment.

Q Could you check that for me?

A Yes. I don't appear to have that particular one with me. Let me check the other one.

Q Okay. His name appears to be Ferno.

A I don't appear to have that one, either.

Q And I take it you just simply can't tell me of your own knowledge what that means?

A Not at this time, no.

Q Okay. Then there is a column on the right hand side, district number, and then a series of numbers. Do you know what that means?

A No, I do not.

MR. NICHOLS: All right. All right, your Honor, at this time I have no further objection to Exhibit D going into evidence if Mr. Waterman so wishes it in.

MR. WATERMAN: Yes, we would offer it in.

THE COURT: All right, it will go into evidence then as Exhibit D.

(Whereupon, Defendant's Exhibit D, previously marked for purposes of [211] identification, was received into evidence.)

Q BY MR. NICHOLS: Mr. Conway, we've been talking about facilities located in the Pineridge Ranger District at Big Creek and Music Creek.

Now, are you able to tell me the locations of the properties that your subordinates viewed as being comparable properties for the purposes of establishing imputed income?

A No, we did not maintain a list or record of the properties that were considered.

Q And if I ask you for the same question in connection with Trimmer and Pinehurst your answer would be the same?

A My answer would be the same.

Q So you don't know how near or how far those comparable quarters would be to the quarters we're talking about?

A As far as precisely how near and far, no. I would merely say that they surveyed the rentals in the area, the closest ones they could find.

Q But you don't know how close that is?

A I don't know how close that was.

Q Okay. Thank you. Mr. Conway, in considering comparable values, would your office have considered as a factor to be cranked into the exercise of your judgment the existence or non-existence of paved streets in the area of [212] the quarters?

A In the resort areas I doubt that this would have been much of a consideration, although I would have to

say that in all probability most of the rentals that we surveyed would have been on streets that were at least oiled.

Q So you would—

A Because they probably would have been in the subdivided areas of Huntington Lake and Shaver Lake.

Q You would have given it some consideration. You can't tell me what degree?

A No, I can't.

Q Okay. Would you have considered street lighting?

A I rather doubt that any street lighting existed in any of these locations.

Q If it had existed would you have considered it?

A I can't tell what the appraiser might have considered in his own mind.

Q Might he have considered it?

A He might have considered it.

Q What about sidewalks?

A To my knowledge there would be no sidewalks in any of these areas, but it would have been a factor again that would have been considered if it had been there.

Q And lawns, trees and landscaping, would that have been considered?

A If any of them existed they would have been con-
[213] sidered. I rather doubt that any—

Q All right. Rather than go through each of the individual items, Mr. Conway, I'll ask you to take a look at government's one which is the Bureau of the Budget Circular A45 and in particular ask you to take a look at paragraph 5F under the heading "Amenities" and I will ask you if there are any of the fifteen items set forth therein that you would, you or your appraisers would specifically have excluded from your consideration in determining fair rental value?

A I would say if we were aware of any of the existence or non-existence of any of these fifteen items that we would have considered them in relating our rents, one property to the other.

Q Fine. Thank you. Now, you told us, I think, that you were aware of the various incursions of the government and its rights upon the occupancy of the individual employees in these facilities?

A We were aware that the government had the right to take over the premises.

Q Yeah, and you were also aware as I understand it that the government in fact limited the use of the premises in certain ways, for example by not allowing free choice of color schemes and all, numerous matters that have been testified to?

A Yes, we were, if not of all of these restrictions at least that restrictions did exist that the government had [214] control of the type of use that was to be put to the property.

Q All right. Now, I take it from the fact that you were aware of these restrictions and from your testimony that you reduced the value or reduced your assessment of the value of the occupancy by the individual plaintiffs by reason of these factors to some degree?

A This was one of the considerations that would have been made in arriving at the judgment of the value of the property.

Q Right, and it was a consideration intended to reduce the assessment from what it might have otherwise been?

A It would have influenced both the imputed economic rent and the final value judgment made by the appraiser.

Q Right, in a downward direction?

A Yes.

* * * *

[225] THE COURT: On the Court's own motion then the plaintiff is, the plaintiffs are re-opening their case for the purpose of giving further testimony.

THE WITNESS: Do I have to be sworn again?

THE COURT: No, you don't have to be sworn. And the testimony the Court's concerned with is whether the employee pays his rent for the house in advance or whether it's paid after the occupancy period has terminated or the occupancy, well, whether the pay period of occupancy, if you want to put it that way, has been concluded. But I'll let Mr. Nichols ask the question.

(Whereupon, Mr. Mitchell regained the stand.)

Q BY MR. NICHOLS: Mr. Mitchell, when the money is withdrawn from the paycheck by way of the bi-weekly payroll deduction, does that deduction apply to the occupancy of the employee for the preceeding two-week period or the succeeding two-week period?

A The preceeding two-week period.

Q And in the event that employee occupies the quarters for a pariod [sic] shorter than the entire two-week period, is the [226] full amount of the two-week deduction deducted or is there a pro-ration?

A There is a pro-ration.

Q And what is that pro-ration based on?

A It's based upon a daily rate which is computed by dividing I believe it's fourteen into the bi-weekly rate.

Q All right. There's been some testimony concerning employees being temporarily dispossessed from their quarters for emergency purposes, fire fighting, general headquarters and that sort of thing.

Are deductions made from the employee's salary for quarters occupancy for the periods of time that he has been dispossessed?

A Well, I'd have to say they are not supposed to be. There is no authority to. There is always a possibility it is a slip up and it was automatically recorded on his time and attendance report, but in answer to your question specifically they're not supposed to be charging him for those quarters during a period he's not occupying.

Q And if they do it's simply somebody's—

A It's an error.

Q Yes.

A Yes.

MR. NICHOLS: All right. I think that's all that I have then, your Honor.

MR. WATERMAN: May I just ask a brief question along [227] these lines. I don't know if Mr. Mitchell knows.

Q It's kind of a hypothetical situation, Mr. Mitchell, supposing fire control officer A who has a permanent residence on a station in an effort to fighre fire moves into another area and dispossesses Forest Service employee B, now it's your testimony that B then would not be charged

for the rent for his residence during the period of dispossession?

A That's right.

Q Would the fire control officer A, would he be charged for the use of that residence while he is there?

A No, he would not.

Q He would not. But as long as he maintained his own permanent or regularly assigned residence he would remain or he would continue to be charged for that?

A Yes, that's correct.

Q So the government just doesn't get any rent during that period of time, is that it?

A That's right, for that particular dwelling that's being used in an emergency.

MR. NICHOLS: Well, in Mr. Waterman's example A, the fire control officer during the time he was occupying B's quarters would not have a deduction made for his own quarters.

THE WITNESS: Oh, yes, he would, yes, he would.

Q BY MR. NICHOLS: He would. Even though he had been moved out of his own quarters and into somebody elses quarters?

[228] A No. In Mr. Waterman's example he was not moved out of his official quarters per se, Mr. Nichols. He moved out voluntarily to move to a new location to take command situation of the fire at a GHQ that was established in another quarters, if I understand the example, married or not he would still be paying rent on the quarters that he is assigned.

Q And he would be on per diem or something of this sort when he moved into the—

A Normally he would be.

Q —new quarters?

A Yes.

MR. WATERMAN: I have no further questions.

MR. NICHOLS: I have nothing else.

THE COURT: And the difference would be whether he voluntarily made this move in order to better serve the government, that is fight the fire where the fire was, for instance, or whether he was ordered to leave?

THE WITNESS: No, your Honor, I don't think so. I didn't mean to make that distinction.

THE COURT: It would be the same in either case. If he was ordered to go from Pinehurst to Dinkey to fight the fire or whether he just went on his own accord under his own authority, he would still continue to pay his rent on the house at Pinehurst.

THE WITNESS: Yes, sir.

* * * *

PLAINTIFFS' EXHIBIT 1

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
Washington, D.C. 20503

October 31, 1964 — CIRCULAR No. A-45
Revised

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Policy governing charges for rental quarters and related facilities.

1. *Purpose.* The purpose of this Circular is to establish the principles and standardize the procedures by which agencies of the Federal Government set and administer rents for quarters and charges for related facilities supplied to employees and others. This revision replaces and rescinds Circular No. A-45, dated June 3, 1952.

2. *Authority.* This Circular is issued by virtue of the authority vested in the President by section 6 of the act of August 20, 1964 (Public Law 88-459), and delegated to the Director of the Bureau of the Budget by Executive Order 11184, dated October 13, 1964.

3. *Coverage.* The provisions of this Circular apply to all rental quarters located within the several States of the United States, the District of Columbia, the territories and possessions of the United States, and the Commonwealth of Puerto Rico.

4. *Policy.* Public Law 88-459 requires that rental rates, and charges for other facilities made available in connection with the occupancy of rental quarters "shall be based upon the reasonable value . . . in the circumstances under which provided, occupied, or made available". Rents or other charges may not be set so as to provide an inducement in the recruitment or retention of employees, or as an inducement to encourage the occupancy of existing Government housing (see 5 U.S.C. 71). The

establishment of rates truly reflecting "reasonable value" should not operate as a barrier in recruitment or retention of employees when the principle of "comparability", as hereinafter set forth, has been properly applied.

5. *Definitions.*

a. *Rental quarters.* Except as specifically excluded herein, the term "rental quarters", as used in this Circular includes all quarters supplied, under specific Government direction, as an incidental service in support of Government programs. It excludes "public quarters" designated for occupancy by members of the uniformed services with loss of allowances, but it includes quarters occupied by such personnel *on a rental basis* under 37 U.S.C. 403(c), 42 U.S.C. 1594a(f) and 1594b, and other authority. It includes quarters owned by or leased to the Government. It includes quarters not only for Government employees but also for contractors, contractors' employees and all other persons to whom housing is provided as incidental to the performance of a Government activity. Finally, it includes housekeeping and nonhousekeeping units (including trailers but not tents), furnished and unfurnished.

b. *Comparable housing.* Comparable housing is housing generally equivalent in size with the rental quarters, with the same number of bedrooms, and with generally equivalent amenities and facilities, including garage. In determining comparability, it is necessary to give full consideration to all distinguishing characteristics, such as the amount of space and the utility of its arrangement, which affect the relative rental value.

c. *Private housing.* Private housing is housing rented on a "landlord-tenant" basis, with rental rates reflecting the fair market value of the accommodations to the tenant. This is distinguished from housing rented on an "employer-employee" basis, for which other considerations may have influenced the rental rates. Thus, such housing as other government-owned housing (Federal, state or local), housing provided by private businesses for their employees, residences of clergymen provided by

churches or religious societies, and caretakers' housing are excluded from the definition of private housing, and should not be used in rental rate surveys.

d. *Established communities.* For the purposes of calculating a deduction under paragraph 6c(1) of this Circular, an established community is a population center offering the minimal community services listed below on a year-round basis, or, alternatively, on approximately the same seasonal basis as the occupancy of the Federal rental quarters under consideration. Conformity with this definition, without regard to population size or other criteria, is the sole basis for identification of an established community.

Services	Minimum
Medical	1 physician, 1 dentist.
Educational	Public elementary and high school (unless transportation is provided without charge to a county or district school).
	Public library, school library available to the public, or scheduled mobile library.
Shopping	Grocery, drugs, clothing, hardware and general household needs.
Religious	Congregations of two faiths or denominations.
Public transportation	Connection with at least one major town or city by common carrier.
Minimal social, cultural, or entertainment facilities	

e. *Nearby representative private community.* For the purposes of establishing comparability, a nearby representative private community is the nearest community to the rental quarters offering a rental housing market, together with the minimal services set forth in the preceding paragraph. It must be a community which is not unreasonably affected by conditions of seasonal agricul-

ture or tourism, population explosion, severe economic depression, or other such conditions which may have created an inequitable rent structure in that community not shared by the general region in which the rental quarters are located. "Representative" is intended to recognize that comparability in housing includes such things as the economic environment of the housing. Thus, for example, housing in a small Government reservation should not be directly compared with housing located adjacent to undesirable areas in a large city. It is intended that comparable housing be selected as nearly as possible to establish a rental rate that truly represents the "reasonable value" of the quarters to the occupant.

f. *Amenities.* For purposes of making adjustments for amenities under paragraph 6c(2) of this Circular, amenities include:

(1) Paved streets.

(2) Street lighting at least at intersections.

(3) Sidewalks.

(4) Lawns, trees, and landscaping.

(5) General attractiveness of the neighborhood.

(6) Community sanitation services.

(7) Reliability and adequacy of water safe for household use.

(8) Reliability and adequacy of electrical service.

(9) Reliability and adequacy of telephone service.

(10) Reliability and adequacy of fuel for heating, hot water and cooking.

(11) Police protection.

(12) Fire protection.

(13) Unusual design features of the dwelling.

(14) Absence of disturbing noises or offensive odors.

(15) Standards of maintenance.

g. *Basic rental rate.* The basic rental rate is the monthly rental value of the quarters, established in accordance with the provisions of this Circular, before applying any deductions or additions.

h. *Availability of alternate housing.* For purposes of applying paragraphs 6c(5) and 6c(6) of this Circular, the determination of the availability of alternate housing will comply with these rules of availability of housing for rent or for sale and those concerning commuting distances contained in Bureau of the Budget Circular No. A-18.

6. *Principles.*

a. *Basic rent principle.* When rental quarters are located within or adjacent to (not more than five miles from the boundary of) an established community which offers a rental housing market, basic rental rates will be set at rates prevailing for comparable, private housing in and adjacent to *that* community. When rental quarters are not within or adjacent to such a community, agencies may employ either of the two following methods with regard to any locality:

(1) *Comparability with the nearby representative private community.* Rental rates in and adjacent to the nearby representative private community may be used as a base for establishing comparable rentals.

(2) *Regional basis.* Basic rental rates may be set in comparison with the average rental rates for comparable private housing in an economically homogeneous area in which the rental quarters are located. The area selected should be large enough to permit an adequate sampling of comparable quarters (it may contain several communities), but small enough to maintain economic homogeneity and the area must be permanently defined. Extremely high and extremely low private housing rents should be excluded in computing the average in each classification of housing.

b. *Establishment of basic rental rates.* Essentially, basic rental rates are to be established in comparison with existing private rental rates. However, agencies

are authorized to employ the real estate concept of "rental value" when no rental properties are available for comparison. Only a professional real estate appraiser should be authorized to recommend a rental rate using this method. The head of each agency will establish rental rates, using as a basis impartial recommendations arrived at through one of the following methods:

(1) *Federal employee appraisers.* Agencies are encouraged to utilize their own professional staff appraisers or to make arrangements with the Federal Housing Administration for rental rate appraisals. Such appraisals permit the use of generally accepted real estate concepts insofar as they are in conformance with the basic principles of this Circular.

(2) *Outside appraisers.* If employee appraisers are not used, it may be desirable to secure the services of outside professional real estate appraisers on a fee basis. Such apraisals, however, must demonstrate full application of the principles set forth in this Circular.

(3) *Employee committees.* Agencies may form employee committees, which should include representation of the viewpoint of management responsibility, to determine rentals being charged in the private market, and to recommend rates for rental quarters and other facilities.

c. *Allowable deductions.* There are cases in which the direct application of the principle of comparability with private rents might result in either higher or lower rental rates than "the reasonable value of the quarters". Additions to or deductions from the basic rental rate are therefore required in the specific situations provided for below. Agency files must contain full information in support of additions to or deductions from the basic rental rate, in each such instance. The total amount deducted for all reasons must not be excessive, resulting in a rental rate to the occupant that is less than the reasonable value of the quarters, since this would constitute a supplementation of salary in contravention of law. In no instance will the rental rate, after all adjustments, be less than 50% of the basic rental rate.

(1) *Locations involving unusual transportation costs.* In some cases the Government supplies quarters to its employees in locations where minimal community services are available only at some distance from the location of the quarters. In this situation, the head of the agency will grant a reasonable deduction to ameliorate the direct economic effects of the unusual transportation costs incurred. The nearest established community as defined in paragraph 5d is to be used as the base community for calculating the deduction even though that community may not serve as the location of comparable private housing used in establishing basic rental rates. A community must be deficient in more than one of the listed services if a town farther away is to be selected as the base for calculating the distance deduction.

The following schedule provides the maximum monthly deduction from the basic rental rate for quarters located at various distances from the nearest established community. It should be emphasized that this deduction is related to the economic disadvantages to the employee inherent in the need for transportation to and from the community. Deductions will therefore be determined, within the maximums, so as to serve the purpose intended. However, the deduction scale adopted will be consistent for all quarters at that locality; no attempt will be made to set deductions individually for families or specific quarters.

Distance in Miles, One Way	Maximum Monthy Deduction
Less than 10 miles	No deduction
10 but less than 20	$15.00
20 but less than 30	$25.00
30 but less than 40	$35.00
40 and more miles	$45.00

The mileage used in computing a deduction for extraordinary distance will be that of the shortest usually traveled route from the rental quarters to the nearest shopping district of the established community. Where the shortest usually traveled route is seasonally closed, a weighted average distance will be used for the en-

tire year, based upon the number of months each route would ordinarily be used.

In unusual cases, where travel to and from the community is fully dependent upon established and scheduled public or government-operated means of transportation, and personally owned vehicles cannot be used, the scheduled elapsed time of a round trip may serve as the basis for the deduction, rather than mileage, using the following table of maximum deductions.

Elapsed Time, Round Trip	Maximum Monthly Deduction
Less than 2 hours	No deduction
From 2 hrs. to less than 4 hrs.	$15.00
From 4 hrs. to less than 5 hrs.	$25.00
From 5 hrs. to less than 6 hrs.	$35.00
6 hours and more	$45.00

For purposes of using the foregoing table, the round trip time will be the shortest elapsed time allowed by any combination of outgoing and return trips which permits at least one hour at the established community. Trips scheduled to leave the departure point only between the hours of 9:00 a.m. and 4:00 p.m. need be considered. The round trip departure and ending point will be the scheduled stop nearest to the rental quarters.

(2) *Adjustments for amenities.* Adjustments in rental rates will be made to reflect higher or lower standards of amenities which may exist for the rental quarters in relation to those of the private housing used for comparison. When appraisals are made by a professional appraiser, the record supporting his recommendations should demonstrate the extent to which amenities are reflected in the recommended rate.

When employee committees are used to recommend rates, the method of providing an adequate adjustment will be as specified herein. If the rental quarters are deficient in the amenities, as defined elsewhere in this Circular, a deduction from the basic rental rate will be made. Where the comparison is reversed, the rental rate for quarters will be increased. The addition or deduction will be determined as follows:

Each of the amenities listed in paragraph 5f will be considered in relation both to the rental quarters and to the housing used for comparison. Each of the amenities present in each case will be assigned the value of two (percentage) points. The difference in total points between the values assigned the rental quarters and those assigned to the housing used in establishing comparability will determine the deduction from, or addition to, the basic rental rate. For example, the amenities listed are all present in much the same degree for both the rental quarters and the comparable housing, except that the water service at the rental quarters is subject to frequent disruption (or the water frequently requires boiling for safe use). In this example, the total points related to the rental quarters would be lower by 2, and the rental would be reduced by 2% of the basic rental rate.

The inclusion of "Standards of maintenance" is intended to result in an increase or decrease in the rental rate in the manner provided above, whenever the maintenance supplied by the agency for its quarters is substantially superior or inferior to that supplied for the private housing used to establish comparable rental rates. Standards of maintenance considered in each case will include care of grounds as well as interior and exterior maintenance of structures. Those factors which are subject to some judgment, such as general attractiveness of the neighborhood, will not be considered as a basis for adjustments unless there is clearly a cognizable difference. When this is so, the factors will be applied whether they operate to increase or to decrease the rent.

(3) *Impositions on privacy or space.*

(a) *Space devoted to official use.* Cases in which the head of the agency determines that the use of a portion of the quarters is required for the purpose of accommodating official visitors, for office space, or for the general convenience of the public require special treatment. These would ordinarily be considered in appraisals made by professional appraisers. When committees are used, and

when no comparable situation can be found by which a fair rental can be established, a deduction from the otherwise basic rental rate may be established by the head of the agency. The deduction will recognize the frequency of the official demands and the extent to which the space and convenience for the private use of the occupant are restricted. In each such case the agency will make and record in its files a specific determination of the exact conditions that exist. If the imposition is virtually a daily occurrence, and the private use of the family area is seriously diminished, a deduction of 10% of the basic rental rate is allowable. Deductions of less than 10% will be adopted in direct proportion to situations of either lesser frequency or of lesser seriousness in their impact upon privacy.

(b) *Other impositions.* Employees may live within the confines of a Government installation or reservation as a condition of their employment, by choice, or because of the lack of a suitable alternative. Such conditions will not serve as the basis for a rental deduction to compensate for the inconvenience to the employee or his family. Likewise, the rental rate will not be decreased to take account of so-called "institutional atmosphere" "hazards of the job or to the family," or other such conditions. Where the agency believes that extreme circumstances exist for some Federally provided housing such as to cause the rental rate established by this Circular to be unreasonable, it will refer such cases to the Bureau of the Budget for an exception under the provisions of paragraph 6d(4).

(4) *Maintenance of two households.* Where it is necessary for an employee to maintain two households for the convenience of the Government, one permanent and one temporary, and no provision is made for the payment of per diem, the head of the agency is authorized to adjust the rental rates for the temporary quarters provided to the employee so that the combined rent which the employee must pay over a twelve month period is not excessively burdensome. Unless the head of the agency determines that the circumstances in any case fully

justify a greater deduction, the adjustment will not exceed 20% of basic rental rate for the temporary quarters.

(5) *Excessive size or quality.* At some Government stations, an employee will not be able to occupy quarters of the same size or quality that he would select in a private community. Where he must accept size or quality in excess of his needs for lack of available alternate housing, the quarters will not have the "reasonable value" to him that would otherwise be reflected by comparison with private rental housing. In exceptional cases of this kind, therefore, a special adjustment to avoid placing an extra burden on the employee may be made to reduce the rent to that comparable for housing of the type that the employee needs. In these circumstances, the rent (excluding utilities) charged an employee will not exceed 20% of his gross salary (pay and allowances). Determinations of this nature will be supported in the files of the agency. This deduction will not be allowed to employees for whom suitable alternate housing is available, nor will it continue beyond one month subsequent to the availability of any private housing more suitable to his needs. Neither will the deduction continue beyond one month subsequent to the availability of rental quarters more suitable to his needs, unless the head of the agency determines that the reassignment of quarters in that instance will not serve to benefit the Government.

(6) *Inadequate size.* A deduction of up to 10% of the basic rental rate is allowable if the Government quarters are clearly inadequate in size for the needs of the employee's family, provided that more adequate private housing or rental quarters are not available to the employee. The deduction will not continue beyond one month subsequent to the availability of private housing more suitable to his needs. Neither will the deduction continue beyond one month subsequent to the availability of rental quarters more suitable to his needs, unless the head of the agency determines that the reassignment of quarters in that instance will not serve to benefit the Government.

(7) *Differential between furnishd and unfurnished.* If there appears to be an inadequate market of comparable furnished housing for purposse of comparison with furnished quarters, the agency may use as a basis the rents on otherwise comparable unfurnished private units, and adjust these by a reasonable charge for furnishings.

(8) *Lack of all-weather construction.* If quarters, by reason of poor design or lack of all-weather construction, require an unreasonable additional expense to the employee for heating, a deduction is allowable under the following terms: If the rental quarters in question require expenses to the occupant in excess of $50 per heating season over the average of heating costs for the comparable housing as determined by a suitable survey, the head of the agency may determine that 90% of the excessive costs (those in excess of $50 over the average) may be deducted from the annual rental rates. The total deduction will be applied to rentals applicable to the months of the heating season.

d. *Qualifications and extensions*: The principle of comparability with private rental practice may be modified in the cases, and under the conditions, described below:

(1) *Extension of comparability.* For lack of available alternative quarters, employees must sometimes occupy space for use as quarters which is generaly unsuitable for that purpose. Such space may be unsuitable, for example, because it was originally built for seasonal occupancy only, or because it was not originally built for use as quarters. In other instances, quarters may be such as to be suitable only for particular types of occupancy, such as rooming houses, bunk houses, bachelor quarters, residence hotel-type structures, barracks-type structures, or guard and lookout cabins.

In any case such as the foregoing, where no comparable rental data can be obtained, or professional appraisals are not made, rental rates will be determined by the square footage occupied, at a rate equivalent to one-half the basic rental rate per square foot charged for the

nearest adequate rental quarters of the same or any other Federal agency. This rate will apply only to the shelter rental, with additions thereto for all other facilities and services provided, (such as water, hot water, heat, light, linens, and furniture), at rates comparable to those in the area. Rental and other charges will be based upon normal capacity, and when so determined will remain in effect for each occupant without regard to fluctuations in the number of occupants from time to time either above or below normal capacity.

In buildings where space is assigned for occupancy of several persons or families, common use space in the building will be distributed to all occupants in proportion to the space assigned for the sole occupancy of each, to determine the number of square feet chargeable to each. Common-use space will include washroom, stairs, hallways, storage, lobby or lounge, etc.

(2) *Transit quarters.* Quarters occupied on a temporary or transient basis, that is, normally for 60 days or less, will be charged for at rates equivalent to private transient housing of comparable type and quality. These rates may be set on a nightly or weekly basis, or both. If comparable private transient housing does not exist in the area, the rental may be established by determining the reasonable monthly rental rate for the quarters through application of the other provisions of this Circular, and adding to the monthly rate an additional charge of at least 20%, the total to be divided by 30 days for the nightly rate or 4⅓ weeks for the weekly rate.

(3) *Territories and possessions.* The general policy stated in this Circular is to be applied in the territories and possessions. However, the method of determining specific rates in each area will require approval of the Bureau of the Budget in advance. Proposals must demonstrate that the method to be used will be impartial and consistent for all rental quarters in the same area, and that rents and other charges will be set at the reasonable value of the quarters and other facilities.

(4) *Exceptions.* Efforts have been made in the preparation of this Circular to allow for the unusual circumstances that exist with respect to rental quarters. Alternatives to the requirements included in this Circular will therefore be prescribed only upon written request in those very unusual circumstances where it is demonstrated to the Director of the Bureau of the Budget that the application of the provisions of this Circular would not result in a rental rate equivalent to the "reasonable value" of the quarters to the occupant. Whenever alternative requirements may be prescribed by the Director of the Bureau of the Budget, the agency concerned will be notified in writing.

7. *Quarters occupied by members of the uniformed services on a rental basis.* Rental rates and other charges incident to the occupancy of quarters on a rental basis by members of the uniformed services will be established in accordance with the provisions of this Circular.

Those quarters which have been designated inadequate public quarters pursuant to law and regulations of the Secretary of Defense, require special treatment in one respect. The total of the rental rate, plus charges for furniture and utilities (except telephone), will be adjusted, if required, so as not to exceed the quarters allowance of the occupant. The rental rate, as used in the preceding sentence, is the basic rental rate after the additions or deductions required or authorized elsewhere in this Circular have been given effect, including that requirement contained in paragraph 6c, that the rental rate, after adjustments, will not be less than 50% of the basic rental rate.

8. *Utility charges.* Charges to occupants of rental quarters for utilities (such as heat, electricity, gas, water, and ice), when furnished by the Government and metered or measured, will be set by application of domestic rates for similar services in the locality used for comparison. When utilities are not metered or measured, charges will be set by comparison with the cost of such services to the occupants of comparable private rental housing. Such charges will be clearly identified and distinguished from charges for rent. However, in establishing rental rates for non-housekeeping rooms, the room rent may combine shelter rent and utilities without distinction.

9. *Procedures.* Section 6 of Public Law 88-459 provides that "The head of each agency may prescribe and issue such regulations, not inconsistent with the regulations of the President, as may be necessary and appropriate to carry out the functions of such agency head under this Act." Each agency will formalize and record the regulations and procedures for setting rents and service charges. A copy of the regulations and procedures will be transmitted to the Bureau of the Budget, no later than March 1, 1965. A copy of each subsequent revision of such regulations will also be transmitted to the Bureau of the Budget at the time of its release.

10. *Agency regulations and implementation.*

a. *Other guidelines.* In developing agency regulations, the following guidelines should be observed in addition to the other provisions of this Circular:

(1) All appraisals should be thoroughly impartial.

(2) In no event should employee committees, used in recommending rents and other charges, include occupants of the rental quarters under consideration, or subordinants of such occupants.

(3) Where several different Federal agencies supply rental quarters in the same area, special care should be taken to promote a consistent local pattern in rents and utility rates. Efforts should be made to coordinate professional appraisal efforts, or when employee committees are used, to establish interagency committees.

(4) A full record of the findings and recommendations of the appraiser or committee should be kept locally by the agency concerned.

(5) Sufficient information should be maintained centrally by the agency to allow agency management to be informed of the status of administration of the requirements of this Circular.

(6) Opportunity for systematic consideration of appeals from determinations of rents and other charges should be provided.

(7) Employees on leave will continue to be charged for quarters and related facilities, unless permitted to vacate quarters and make them available for reassignment.

(8) It is in keeping with the principle of comparability that agencies assume the responsibilities customarily accompanying landlordship, and that those who occupy rental quarters assume the responsibilities of tenants of privately owned housing, not inconsistent with law.

(9) Section 5 of Public Law 88-459, is as follows:

> "An employee or a member of the uniformed services shall not be required to occupy quarters on a rental basis unless the head of the agency concerned shall determine that necessary service cannot be rendered, or that property of the Govment cannot adequately be protected, otherwise."

Agency regulations should specify the conditions under which the agency head will require such occupancy.

b. *Implementation.* The provisions of this Circular will be applied on or *before March 1, 1965.* They may be applied, without reappraisals or committee reviews in the case of quarters which were appraised or reviewed within the *two years previously.* A new appraisal or review is required for those quarters not appraised or reviewed within two years, or for all quarters involved if any agency intends to change to the regional basis for establishing rental rates, as authorized in paragraph 6a(2). In cases where substantial increases in rents or other charges are being levied (20% or more), the agency may make the adjustment in proportional steps over a period up to twelve months, but in no case will the full

c. *Adjustments to current rates.* To make sure that increase or decrease be delayed beyond March 1, 1966.

rent and other charges reflect changes in the private market, rent schedules will be affirmed or adjusted at

least once every three years. However, utilities furnished by the Government and metered or measured will be adjusted whenever rate changes occur in the locality used for comparison.

d. *Reporting.* The head of each agency will furnish to the Bureau of the Budget reports as to the number of its housing units, the status of appraisals, the results of reappraisals, occupancy, amount of rents and other charges, and other related data, as may be requested from time to time.

KERMIT GORDON
Director

PLAINTIFFS' EXHIBIT 2

TITLE 6400—PROPERTY MANAGEMENT

* * * *

6445—QUARTERS RENTAL

6445.01—Authority. Public Law 88-459, 88th Congress, approved August 20, 1964, is the statutory authority that requires quarters rental rates to be based upon the reasonable value of the quarters to the employee in the circumstances under which provided, occupied, or made available.

Bureau of the Budget circular A-45 dated October 31, 1964, establishes principles and standardizes the procedures by which agencies of the Federal Government set and administer rents for quarters and charges for related facilities supplied to employees and others.

Policy on construction of family housing, including design standards and floor areas, is contained in Bureau of the Budget circular A-18, revised, dated October 18, 1957, and FSM 5650. Circular A-45 and the expansion of FSM 6445 apply for rental quarters, either owned or leased by the Forest Service, for use by employees or others.

6445.02—Objective. The basic objective is to establish the principles and procedures for setting and administering rents for quarters and related facilities supplied to Forest Service employees and others.

6445.03—Policy

1. *Reasonable Value.* Public Law 88-459 requires that rental rates, and charges for other facilities made available in connection with the occupancy of rental quarters "shall be based upon the reasonable value . . . in the circumstances under which provided, occupied, or made available." Rents or other charges may not be set to provide an inducement in the recruitment or rentention of

employees, or as an inducement to encourage occupancy of existing Government housing (5 U.S.C. 71). The establishment of rates truly reflecting reasonable value should not operate as a barrier in recruitment or rentention of employees when the principle of comparability has been properly applied.

2. *Permissive Occupancy.* Rental quarters are provided by the Forest Service for employee occupancy at many locations. Generally such quarters are provided because suitable privately owned quarters are not available. Occupancy usually is permissive rather than required by the Forest Service. See FSM 5651 for policy on providing Government-owned dwellings. Occupancy of Government-owned residences will ordinarily be limited to the following categories of employees:

a. Short-term employees, such as fire control or recreation aids.

b. District Rangers, Ranger assistants, nurserymen and assistant nurserymen, long-term and yearlong aids, and resident officers in charge of Experimental Forests or ranges.

c. Timber-sale officers.

d. Ranger District and research project headquarters clerks. Occupancy by this class of employee is to be limited to unusual situations where the need is critical or where residences are not needed for other personnel in the other categories.

e. Forest Supervisors and Forest staff, or staff assistants, or project staff. This applies only to quarters now occupied by this group. Additional quarters will not be provided for these classes of personnel.

f. Research project leaders, staff assistants, and specialized research personnel headquartered at field project locations or laboratories.

Dwellings will not be provided for Regional Office or Experiment Station headquarters personnel.

3. *Required Occupancy.* Section 5 of Public Law 88-459 contains the following language on required occupancy of quarters:

> An employee or a member of the uniformed services shall not be required to occupy quarters on a rental basis unless the head of the agency concerned shall determine that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise.

*-The Chief has determined that occupancy may be required by Regional Foresters or Directors for specific employees if such occupancy is necessary to:

a. *Provide Service to the Public.* Examples are recreation aides at heavily used remote recreation areas and scalers needed to scale or control movement of logs hauled from timber sale areas.

b. *Protect Natural Resources.* Examples are fire lookouts, fire foreman, suppression crew, or other fire control personnel who either need to be immediately available for fire suppression duties or who are stationed at specific locations according to an approved fire plan.

c. *Operate Necessary Equipment.* An example is certain employees at nursery or research installations.

There may be special situations where an employee is required to live at a specific location in order to protect Government property. If an employee is assigned custodial responsibilities and must live at the Government installation, Regional Foresters and Experiment Station Directors are authorized to require occupancy of Government quarters. Such designations should be limited to one employee at a location. These should be kept to a minimum and used only when it is clearly shown that a custodian must be provided to protect Government property and that no other feasible means of protection can be provided.

The Regional Forester or Station Director will determine specific cases where occupancy is required and notify the employee in writing.

4. *Coordination With Other Federal Agencies.* Where several different Federal agencies supply rental quarters

in the same area, Regional Foresters and Directors should take special care to promote a consistent local pattern in rents and utility rates. Efforts should be made to coordinate professional appraisals or when employee committees are used, to establish interagency committees.

6445.04—Responsibility. The Chief is responsible for providing Service-wide instructions for administering residence occupancy and related facilities. Regional Foresters and Directors will provide coordinated instructions as necessary to implement prescribed policy for rental quarters and related facilities in their respective Regions and Stations.

The provisions of this section of the manual apply to all Forest Service owned or leased rental quarters located within the several States of the United States, the District of Columbia, the territories and possessions of the United States, and the Commonwealth of Puerto Rico.-*

*-Exceptions, or alternatives, to the quarters rental policy must be authorized in writing by the Director of the Bureau of the Budget. Regional Foresters and/or Station Directors will submit requests for exception to the Chief. Requests must clearly demonstrate that the application of the present quarters rental policy results in a rental rate which is not the "reasonable value" of the quarters to the occupant.

6445.05—Definitions. Defined below are terms used throughout the expansion of FSM 6445.

1. *Rental Quarters.* These are all quarters supplied, under specific Government direction, as an incidental service in support of Forest Service programs. It includes quarters owned by or leased to the Government. It includes quarters not only for Forest Service employees but also for contractors, contractors' employees, and all other persons to whom housing is provided as incidental to the performance of a Forest Service program activity. Finally, it includes housekeeping and non-housekeeping units (including trailers, but not tents), furnished and unfurnished.

2. *Comparable Housing.* This is private housing generally equivalent in size and quality to Government rental quarters, with the same number of bedrooms, and with generally equivalent amenities and facilities, including garage or carport.

3. *Private Housing.* This is housing rented on a "landlord-tenant" basis, with rental rates reflecting the fair-market value of the accommodations to the tenant. This is distinguished from housing rented on an "employer-employee" basis, for which other considerations may have influenced the rental rates. Thus, such housing as other Government-owned housing (Federal, State, or local), housing provided by churches or religious societies, and caretakers' housing are excluded from this definition of private housing, and should not be used in rental rate surveys.

4. *Established Community.* This is a population center offering the minimal community services listed below on a year-round basis, or, alternatively, on approximately the same seasonal basis as the occupancy of the Government rental quarters under consideration. This definition shall be used without regard to population or other additional criteria, to determine an established community.

a. *Medical.* One physician and one dentist.

b. *Educational.* Public elementary and high school, unless transportation is provided without charge to a county or district school.-*

*-Public library, school library available to the public, or scheduled mobile library.

c. *Shopping.* Groceries, drugs, clothing, hardware, and general household needs.

d. *Religious.* Congregations of two faiths or denominations.

e. *Public Transportation.* Connections with at least one major town or city by common carrier.

f. *Social, Cultural, or Entertainment Facilities.* One service or other social organization, one theater,

movie house or other public facility that offers entertainment at least weekly.

5. *Representative Private Community.* This is an established community with an adequate rental housing market for making a rental survey.

It must be a community which is not unreasonably affected by conditions of seasonal agriculture or tourism, population explosion, severe economic depression, or other conditions which may have created an inequitable rent structure in that community not shared by the general region in which the rental quarters are located.

The full-facilities communities used in Forest Service rental surveys since 1960 reflect the requirement of an adequate rental housing market within this definition.

6. *Rental Housing Market.* This is a reasonable selection of private rentals of the size and type needed for an adequate rental survey.

7. *Base Rental Rate.* This is the pay period rental value of the quarters, established in accordance with the provisions of FSM 6445.3 before applying any deductions or additions.

8. *Amenities.* These are the 15 items listed in FSM 6445.23 which are specified by Budget Bureau circular A-45. Deductions or additions to base rental rates will be made to reflect the difference between amenities present in the private rental sample and in the specific rental quarters.

6445.1—Conditions of Quarters Occupancy. Regional Foresters and Directors should define the generally accepted and recognized tenant-landlord relationships which are particularly applicable in their Region and which supplement the following:-*

*-1. *Government Maintenance Responsibility.* (FSM 5651.) Forest Supervisors and Research Project Leaders will establish a maintenance schedule for quarters. Occupants should not be permitted to make alterations or additions to quarters. Such work should be part of planned, approved, and scheduled building betterment and/or maintenance program.

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Exterior and interior painting or redecorating of Government quarters should be scheduled for accomplishment on a planned basis. Such work will normally be done by qualified individuals. The occupants' preference of colors should be given consideration; however, final decision and approval rests with the proper administrative authority.

2. *Occupant Maintenance Responsibility.* The occupant is responsible for current minor maintenance of house and grounds in accordance with accepted rental practices. Minor maintenance includes, but is not limited to, such items as mowing and watering the lawn to lot lines; pruning shrubbery; cleaning rain gutters and downspouts; shoveling snow; replacing faucet washers and light bulbs; and maintaining a clean and orderly exterior and interior appearance.

3. *Damage Beyond Normal Wear and Tear.* Normal wear and tear is defined as the deterioration through use by occupants exercising reasonable and proper care. It will usually be evidenced by floor wear from ordinary foot traffic, wall and floor marks made by furniture and appliances, abrasive wear of furnishings, and the like. It does not include excessive damage to walls and floors, freezing damage to water pipes because of negligence, damage attributable to misuse of appliances and stoppage of plumbing fixtures, or major burns and stains. Established practice requires that responsibility for repair of damage beyond normal wear and tear be assumed by the occupant of Government quarters.

4. *Quarters Inspections.* Occupants of Government quarters will permit authorized Forest officers to enter to conduct condition surveys, fire, safety, and other required inspections. Arrangements should be made with the occupant in advance for such inspection (FSM 5651).

6445.2—Rental Surveys. Base rates for rental quarters shall be established for Forest Service by conducting periodic rental surveys. The rental survey will apply to all rental quarters, owned or leased, in the same Region, zone, or other area established as the survey area.

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The Forest Service will pilot test the consumer price index-rent (CPI-R) procedure for establishing quarters base rates. The test was approved by the Bureau of the Budget (BOB) by letter dated-* *-November 8, 1965. Rental surveys as prescribed in this section will not be made in 1966 by the Forest Service except for Region 10. Region 10 will conduct a Regional survey prior to March 1, 1966, to establish Regional rental rates. All other Regions will adjust the existing base rental structure before March 1, 1966, using a percent change in the CPI-R furnished by the Washington Office (FSM 6445.-34).

All Regions and Stations will conduct a normal quarters rental field survey in accordance with this code of the Forest Service Manual before March 1, 1969. The base rates established at that time will be compared with base rates established in 1963 and adjusted to 1969 by use of CPI-R. Early in 1969 the Forest Service will submit to the BOB an evaluation of the CPI-R method for adjusting base rates. If this evaluation indicates the CPI-R system gives results comparable to a field survey the CPI-R system will be retained.

6445.21—Survey Boards. Each Region and Station will set up a single rental survey board. The Regional Forester and Director will designate the composition of the board. The duties of the survey board include:

1. Prescribing adequate Regional survey sampling instruction.

2. Making "on-the-ground" checks of both Government quarters and private rental samples to verify accuracy of data and suitability of the sample.

3. Reviewing base rental rate computations.

4. Recommending base rental rates for each class of quarters to the Regional Forester and Director for approval.

5. Acting on appeals and reviews, and carrying out required approval action for allowable rental deductions and other charges.

6445.22—Survey Area. This area should be as large as possible—usually from a major portion of a State to several States in size. Some Regions will use a single survey area. A large survey area provides a broader base for obtaining comparable private rental samples. Base rental rates establish for a large survey area are more efficient to administer.

The basic criterion for establishing the boundaries of a survey area is economic homogeneity; that is, generally uniform living costs and related economic conditions. General knowledge of the economic variations within a Region is helpful in determining the boundaries for a survey area. In some cases it may be necessary to make a-* *-statistical analysis of sample rental data to determine whether significant differences occur within or between survey areas. Extremely high and extremely low private housing rents should be excluded in computing the average in each classification of housing.

6445.23—Survey Procedures. Regions and Stations will conduct a rental survey to develop base rental rates for all classes of Government quarters. The next scheduled rental housing survey in the Forest Service is 1969. Some Regions with few Government rentals scattered over a wide area of varying economic conditions may utilize direct comparison appraisal to develop base rates for individual Government quarters. In these cases data for at least three comparable private housing rentals will be obtained in the nearest representative private community for each Government rental. Regional Foresters and Directors in these Regions will establish uniform procedures for conducting direct comparison surveys.

1. *Sampling Private Rentals*

a. Size and design of samples will be developed with the advice and help of Station statisticians. Sampling will be planned for each survey area to obtain private rental rates for dwellings that are comparable to Forest Service quarters. Private housing comparable to Forest Service classes D, E, or any of subclasses X usually is unavailable in suf-

ficient quantity for sampling purposes. These dwelling classes will normally not be included in private rental survey. The following items should be considered in developing a stratified sampling plan:

(1) *Proximity.* Plan samples in the nearest representative private communities to the Government dwellings.

(2) *Distribution.* Match, as well as possible, the number of private rent samples by class of dwelling to the number of Government dwellings in each class.

(3) *Cluster.* Consider the implications of clusters of Government dwellings for assignment of weights.

(4) *Precision.* As a guide, the standard error of estimate for the samples for each class of dwelling should not exceed 5 percent of the established base rate.

b. Sampling instructions will be developed for use by sampling personnel. They must be complete and clear to reasonably ensure accurate data collection and will specify:

(1) Sampling locations.-*

*-(2) Number of samples by classes.

(3) Method for selecting samples.

(4) Method for recording data.

All sampling personnel must be familiar with the definitions in FSM 6445.05 and the principles involved in determining comparable rental rates and reasonable value.

Sampling personnel will record sample data on form 6400-3. The individual samples will be summarized on form 6400-4. All forms will be submitted to the Regional Office, where they will be kept on file.

2. *Inventorying Government Rentals.* A form 6400-1 will be prepared and maintained for each

Government rental quarters. Copies will be filed at the Forest or Research Project Location and at the Regional Office or Station.

a. Each Government rental will be identified in one of the following quarters classes:

(1) *Class A.* A standard dwelling with three bedrooms or more having modern facilities of heat, electricity, water, and bath.

(2) *Class B.* A standard dwelling with two bedrooms having facilities comparable to class A.

(3) *Class C.* Three-room guard cabin dwellings with facilities comparable to class A.

(4) *Class D.* House trailers for family occupancy having equivalent class A facilities.

(5) *Class E.* Cabins, bunkhouses, crew trailers, or quarters, for supervisory personnel designed for bachelor occupancy, with equivalent class A facilities available.

(6) *Subclass X.* This subclass will be used for those quarters which are in poor condition and are generally unsuitable for quarters occupancy. This class applies to quarters with basic deficiencies rather than a mere lack of maintenance. The class includes structures which have largely outlived their usefulness and should be (1) abandoned, (2) reconstructed, (3) modernized, or (4) replaced. Such structures will be classified as AX, BX, CX, DX, or EX. (Class EX would correspond to former quarters class F.)-*

*-b. Each Government rental (except class E) will be placed in one of the accessibility groups described in FSM 6445.43.

c. An amenities rating will be established for each Government family occupancy rental quarters in class A, B, and C (FSM 6445.34). The BOB recognized 15 amenities for use in comparing Government and private rentals.

Regional Foresters and Directors may establish standards for amenities within the guidelines listed below. It is important that amenities be rated uniformly for both Government and private rentals. Amenities will be rated as present or not present. The number of amenities present will determine the amenities rating.

	Amenity	Guide
1	Paved streets.	Hard surfaced streets, or roadways, adequately maintained, with or without curbs.
2	Street lights at least at intersections.	Exterior access lighting of quarters area.
3	Sidewalk.	A walk, in front or side, to lot lines.
4	Lawns, trees, and landscaping.	Normal lawn and landscaping elements.
5	General attractiveness of the neighborhood.	Neighboring premises with or without dwellings, should not detract from the quarters being evaluated.
6	Community sanitation service.	Garbage disposal service should be available along with a public sewerage system or an adequate septic tank system.
7	Reliability and adequacy of water safe for household use.	The system should provide an adequate volume of safe water.
8	Reliability and adequacy of electrical service.	A power system that provides 24-hour service.-*
9	Reliability and adequacy of telephone service.	Twenty-four-hour connection to commercial facilities.

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	*-Amenity	Guide
10	Reliability and adequacy of fuel for heating, hot water, and cooking.	Fuel system that provides semi- or fully automatic service.
11	Police protection.	Locally available regular patrol and 24-hour emergency telephone service.
12	Fire protection.	Fire protection comparable to that available to private rentals in survey communities.
13	Unusual design features of the dwelling.	The design features exceed those found in the average Forest Service dwelling.
14	Absence of disturbing noises or offensive odors.	Noises and odors should not be present to detract from a pleasant living environment.
15	Standards of maintenance	Should meet normal Forest Service minimums.

6445.3—Establishing Base Rental Rates. Survey boards will develop base rental rates for each class of Government quarters for approval by the Regional Forester and Director.

6445.31—Base Rates for Sampled Classes. Regions, with the assistance of Station statisticians, will compute the average rental rate for each housing class from the private housing samples. Normally, these will be housing class A, B, and C samples. Monthly rates will be converted to pay period rates by multiplying by a factor of 0.46. Base rates per pay period will be rounded to the nearer 50 cents.

6445.32—Base Rates for Classes Not Sampled. Normally, it is extremely difficult to obtain comparable private rental samples for classes D, E, and all X subclasses. Where this condition exists, Regions may establish base rates for these classes by extension of comparability. Base rates established by this method should not exceed the base rate of the sampled class from which it is extended. The following examples are illustrative:

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1. *For Class D.* Develop base rates on a square foot basis. Use the average base rate per square foot for the nearest comparable class in the sample. For simplicity in administration, base-* *-rates for class D should be grouped for the common size classes of trailers. Net area of house trailers should be determined in the same manner as for dwellings; that is, space inside exterior walls (FSM 5651.62). Under this procedure class D base rates may be adjusted for accessibility only (FSM 6445.43). The accessibility adjustment shall not exceed 50 percent of the base rate.

Example 1. One-bedroom trailer—200 sq.ft.

Average net area of private rental samples for class C	=600 sq.ft.
Base rate established for class C	$24.00
Base rate per sq.ft. for class C $24.00÷600	=$0.040
Base rate (established by extension of comparability) for class D one-bedroom trailers (200) ($0.040)	=$8.00

Example 2. Two-bedroom trailer—300 sq.ft.

Average net area of private rental samples for Class B	=900 sq.ft.
Base rate established for class B	=$30.00
Base rate per sq.ft. for class B $30.00÷900	=$0.030
Base rate for class D two-bedroom trailers (300) ($0.033) =$9.90 round to	=$10.00

2. *For Class E.* For each survey area a single shelter rental rate for this class of quarters should be developed by extending comparability.

In the example below, class B was considered the most reasonable class to extend comparability. The shelter rate so determined should be increased a reasonable amount to cover facilities and services provided, such as water, heat, and electricity. The combined rate for this

quarters class will not be subject to adjustment for amenities, accessibility, official space, or excessive size.-*

*-*Example*

Average net area of private rental samples class B	=900 sq.ft.
Base rate established for class B	=$30.00
Base rate per sq.ft. for class B $30.00÷900	=$0.030
Average space allowance per individual	=100 sq.ft.
Base rate per individual for class E (100) ($0.030) =$3.00+20%=	$3.60
rounded to	=$3.50

3. *For Subclasses X.* On an individual case by case basis, develop base rates on a square foot basis at one-half the rate for the class of quarters used in extending comparability. All such base rates except class EX, would be subject to allowable adjustments to not less than the minimum. The following examples are illustrative:

Example 1. Class AX

Average net area of private rental sample for class A	=1,000 sq.ft.
Base rate established for class A	=$40.00
Base rate per square foot class A $40.00÷1,000	=$0.040
Base rate per sq.ft. class AX ($0.040) (0.5)	=$0.020
Net area of this AX Forest Service rental	=1,100 sq.ft.
Base rate established for this AX rental (1,100) ($0.020)	=$22.00-*

*-*Example 2.* Class CX

Average net area of private rental samples for class C	=600 sq.ft.
Base rate established for class C	=$24.00
Base rate per square foot class C $24.00÷600	=$0.040

Base rate per sq.ft. class CX
($0.040) (0.05) =$0.020

Net area of this CX Forest Service rental =500 sq.ft.

Base rate established for this Forest Service CX rental
(500) ($0.020) =$10.00

6445.33—Revising Base Rates by Use of Consumer Price Index-Rent. The Washington Office will furnish the rental index. Regions and Stations will use the change in the rental index to adjust the base rates developed by the last rental survey or base rate revision. The Bureau of Labor Statistics will provide the Forest Service with a special rent index based on the smallest city strata used in the national rent index. The percent change developed from this index will be supplied to the Regions by February 15, 1966, and February 15, 1969, for their use in revising base rates for each quarters class. The CPI-R through calendar year 1965 is shown in FSM 6445.34, item 3. The CPI-R is provided by the Bureau of Labor Statistics for internal Government use. It should not be made available for general publication.

6445.34—Revising Base Rates for 1966. The CPI-R will be used in 1966 to revise existing base rate structure in each Region except Region 10. The 1966 base rate revision should be placed in effect on the first full pay period following March 1, 1966. Existing rental survey data will be adjusted to reflect revised instructions as outlined in items 1 through 3 below. Changes should be made on, or attached to, each of the existing forms in the rental survey files. New forms which better reflect these instructions will be developed prior to the 1969 Rental Survey. A suggested format for making the amenities rating for both Government rental quarters and private housing samples and a summary of other action required for the 1966 Service-wide base revision are shown in the following exhibit 1.-*

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*-EXHIBIT 1

Amenities Rating

Identification

Type	Forest number	District number	Building or sample number	Class
☒ Government rental	18	10	1068	A
☐ Private sample				

Number	Description	Present [1]	Not present [1]
1	Paved streets	x	
2	Street lights		x
3	Sidewalk		x
4	Lawn, trees, and landscaping	x	
5	General attractiveness of the neighborhood		x
6	Community sanitation service	x	
7	Reliability and adequacy of water service	x	
8	Reliability and adequacy of electrical service	x	
9	Reliability and adequacy of telephone service	x	
10	Reliability and adequacy of fuel	x	
11	Police protection		x
12	Fire protection		x
13	Unusual design features	x	
14	Absence of noises and odors		x
15	Standard of maintenance	x	
	Amenities rating	9	

[1] See FSM 6445.2 for guidelines.

1. *Inventory of Government Rentals.* These should be brought up to date by:

a. Revising accessibility group and quarters class if needed on forms 6400-1 and 6400-5 to meet new criteria in FSM 6445.23.

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b. Completing an amenities rating for each Government rental (except class D and E).-*

*-2. *Private Rent Samples.* These should be brought up to date by:

a. Completing an amenities rating for each private housing sample used to develop the existing base rates. This may be done very quickly by someone familiar with the survey community.

b. Calculating average amenities ratings for each comparable quarters class A, B, and C, in the private sample used to develop existing base rates. This information will be used in applying the amenity adjustment.

3. *Revised Base Rates for 1966.* These should be calculated for each quarters class by applying the percent change developed from the CPI-R.

The CPI-R furnished to the Forest Service by the Bureau of Labor Statistics is shown below:

Calendar year	Consumer price index-rent
1962	103.3
1963	104.0
1964	104.9
1965	106.0

Because of the variation among Regions and Stations in the time intervals since the last rental reappraisal, the percent change calculation will vary. The basic formula for calculating the percent change is: $\frac{\text{1965 CPI-R}}{\text{Base year CPI-R}}$ x 100. Base year in this calculation is the full calendar year preceding the last Regional base rate change.

Example: Region X established new base rates in March 1963. Its base year is 1962 and the calculation of percent change is $\frac{106.0}{103.3} = 1.02613 \times 100$

$= 102.61 = (+)\ 2.61\%$.

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The following table shows the percent change for several of the possible time intervals:-*

Base year	Percent change
1962	+2.61
1963	+1.92
1964	+1.05
1965	No change

Quarters classes D, E, or X which have been established by extending comparability from CPI-R adjusted class A, B, or C rates would not be further adjusted by a percent change. This would in effect be a double rate adjustment.

6445.4—Applying Base Rental Rates. Forests and centers will calculate rental rates for each of their Government quarters by applying the appropriate adjustments described in this code to the base rental rate for the particular class of quarters. Regional Foresters and Directors will prescribe the required review and approval authority for all the allowable rental adjustments.

Base rental rates for all rental quarters except class E do not include:

1. Utilities such as electricity, water, and gas.
2. Furnishings in excess of those listed in FSM 6445.5.

Base rates for class E do include utilities and furnishings.

All base rates will be rounded to the nearest 50 cents.

The basic record file for each Government rental will be retained at the Forest or Research Project level. This file will clearly reflect the facts and circumstances which support any adjustments (deductions or additions) allowed in accordance with the provisions of this section of the Forest Service Manual. The basic record file will also be maintained centrally at Region and Station offices. The sum of all allowable adjustments for each Government rental should be rounded off to the nearest 50 cents.

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6445.41—Minimum Rental Rate. Minimum rental rate for an individual Government rental is 50 percent of the base rate established for that class of Government quarters. The minimum rental rate will be used for all quarters where the total adjustment indicates a lower rate. For class E quarters the established rate is also the minimum rate.-*

*-*6445.42—Adjustment for Amenities.* This will be applied to each Government rental (except class D and E). Where the amenities rating differs from the average amenities rating of the private rental samples used to develop the base rate—a 2 percent adjustment will be made for each point difference; that is, plus or minus.

Example 1

Average amenity rating for private rent samples class B	=10
Amenity rating for this class BX Government rental	= 9
Difference	= -1
Base rate for this class BX dwelling	=$20.00
Amenity rate adjustment (-1) (-2%) ($20.00)	=$0.40
Quarters rental rate adjusted for amenities	=$19.60

Example 2

Average amenity rating for private rent samples class A	=10
Amenity rating for this class A Government rental	=11
Difference	=+1
Base rate class A	=$40.00
Amenity rate adjustment (+1) (+2%) ($40.00)	=0.80
Quarters rental rate adjusted for amenities	=$40.80

6445.43—Adjustment for Accessibility. This will be made to offset the unusual transportation costs to and from

the nearest established community where minimal required services are available. No adjustment will be made for the intangible disadvantages of isolation.

Distances will be measured to the shopping center of the nearest community that either meets the definition of an established community in FSM 6445.05, item 4, or provides at least five of the six listed services.-*

*-All pay period adjustments for accessibility will be taken from the following table 1. These are the maximum allowable under the BOB's current regulations.

Table 1.—Accessibility groups and allowable deductions

Accessibility group number	Distances to an established community	Accessibility allowance
1	0 to 9 miles	None
2	10 to 19 miles	$7.00
3	20 to 29 miles	$11.50
4	30 to 39 miles	$16.00
5	40 miles or more	$21.00

6445.44—Adjustment for Space Devoted to Official Use. This will be made when a portion of the rental quarters is required on a fairly regular basis for official use. Examples include space needed for office, official visitor accommodations, and public displays and/or receptions.

Space must be specifically assigned for official use to qualify for this adjustment. Occupancy of Government quarters generally creates some infringement upon the privacy of the homelife of the employee-occupant, but no adjustment can be made solely for this impact.

A maximum allowance of 10 percent of the base rental rate will be applied where the private use of the family area is seriously diminished by substantial daily use. A lesser adjustment will be made for less frequent or less serious impacts upon family privacy.

6445.45—Adjustments for Individual Occupants. This will be made only when the rental rate clearly does not reflect reasonable value to the occupant.

1. *Adjustment for Size.* This will only be made when private housing or rental quarters of the size the employee needs is not available. The adjustment will not continue beyond 1 month after a suitable Government rental is available, unless the officer responsible for assigning quarters determines that reassignment in that instance will not serve to benefit the Government.

In exceptional cases of excessive size, the rent charged an employee will not exceed 20 percent of his gross salary, provided the adjusted rental rate is not below the minimum rate for the quarters class.-*

*-Within the above guideline, the adjustment may be made simply by reclassifying the quarters classification downward; for example, the employee has need for a two-bedroom class B dwelling, the class A dwelling which is available for assignment would be reclassified to a class B.

2. *Other Adjustments for Occupants.* These will be made when the following circumstances are applicable:

a. *Headquarters and Seasonal Quarters Furnished to Employees.* Temporary or seasonal quarters, where furnished in addition to headquarters residences to the same yearlong employee, will be considered as necessary adjuncts to headquarters residences and no additional charge will be made for the temporary or seasonal quarters or furnishings therein. One rental rate will apply throughout the season. This yearlong rate will be calculated by totaling (1) the winter or headquarters adjusted base rental rate times the periods of occupancy, and (2) the seasonal residence adjusted base rental rate times the pay periods of occupancy, and then dividing by 26. The number of pay periods occupied will be based on the average season.

Frequently, the scarcity of rental property in a community makes it necessary for a Forest officer to maintain his personally owned or rented home at the headquarters location during the period he oc-

cupies Government quarters at a temporary or seasonal station. This situation has been recognized in the following ruling of the Comptroller General.

An additional rental charge for Government quarters during the same period imposes an unreasonable financial hardship on the individual. To avoid this hardship, it is proper to issue the employee a travel authorization which provides quarters in lieu of per diem while at a temporary station, and retain his official station at his headquarters on a yearlong basis (16 Comp. Gen. 634).

In the event the employee subleases his private residence, regular charges should be made for the temporary or seasonal quarters.

b. *Employees Not Assigned Definite Field Headquarters.* Regular or temporary employees, including project crews and foremen, who are not assigned definite field headquarters for specified periods, are generally classed as field parties in travel status, with or without per diem. Spike-camp occupancy is included in this classification. In the absence of other designated headquarters for such workers, their official-* *-headquarters will be considered as the Forest or other unit headquarters town or station. When quarters are furnished such employees quarters charges will be made.

c. *Lookout Quarters.* Since the primary function of a lookout structure is to provide a place for observation and protection of fire detection equipment the facilities are considered a workshop and not quarters.

When quarters separate from, or in addition to, the lookout structure are furnished the established rental rate will be charged.

In case of intermittent occupancy of quarters, a charge will be made for each night a lookout spends at the quarters.

6445.5—Other Charges. The Forest Service policy, generally, is to supply furnishings and services only where they are not readily available to the occupant from other sources, or are required to accomplish Forest Service work. When they are provided for the occupant's needs, charges will be made separate from, and in addition to, rental rates. Such charges should be reviewed and/or adjusted as local conditions require, but not less frequently than every 3 years.

The policy on providing and charging for utilities and services is discussed below:

1. *Utilities*

a. *Telephone* (FSM 7200)

b. *Electricity.* When commercial power is available a separate meter should be installed by the Government to enable the commercial company to bill the occupant separately for this service; the occupant will then pay the commercial company directly. If the arrangement for a separate meter is impracticable, or when electricity is furnished from a Government-owned plant, the value of the services will be charged based on an appraisal of local domestic rates for similar services.

c. *Heat.* Employees occupying quarters will furnish fuel for ordinary domestic purposes at their own expense or on their own personal time.

d. *Water.* When water is furnished by a city or public utility, meters should be installed at each residence and the occupant should pay for water consumed. Where this is impractical, the pro rata share consumed at personal-* *-residences and for watering the grounds which immediately surround the residence shall be estimated and charged to the occupant.

Where the Forest Service operates, owns and operates, or rents the water system serving the residence, charges will be based on an appraisal of local rates for similar services.

*-March 1966
Amendment No. 3-*

e. *Gas.* Employees will furnish gas for cooking and heating purposes whenever practicable. When this is impracticable because of supply difficulties or intermingled use, the value of the service will be charged based on an appraisal of domestic rates for similar services.

f. *Sewerage.* The Forest Service will furnish and maintain sewer systems including necessary connections to community or Government-owned disposal systems or septic tanks. The Forest Service will pay the recurring cost of securing service from a community system. The rental survey should reflect this service cost in the rental rates of comparable private housing samples.

2. *Furnishings.* Many of the following items are commonly found in both Government and private rentals. No adjustment normally will be made for the presence or absence of these items in an individual Government rental.

a. Screens
b. Window shades
c. Refrigerators
d. Cooking and heating stoves
e. Stove boards
f. Kitchen tables
g. Doormats
h. Cupboards
i. Garbage cans
j. Linoleum or tile on floors

Class D and E quarters may also include beds and chairs or similar items which may or may not be built into the structures.-*

*-March 1966
Amendment No. 3-*

A reasonable charge will be made for additional furnishings. A rate that results in an annual charge of about 7 percent of the actual or estimated acquisition cost is considered reasonable for a full or partial complement of furniture.

6445.6—Appeals and Reviews. Employee occupants of Government quarters may appeal rental rates or other charges for an individual rental whenever they believe that the rental has been incorrectly classified, rates have not been established within these guidelines, or the rates do not reflect the reasonable value of the rental quarters. All appeals will be filed in writing and should outline in detail why the established charges do not reflect reasonable value. No adjustment in the rental rate will be made as the result of an appeal until approved by the Regional Forester or Director. The effective date for any adjustment approved will be the beginning of the first pay period following receipt of the appeal by the Regional Forester or Director.

Regional Foresters and Directors will establish procedures for review of all appeals which are within the guidelines of these instructions. If review indicates that rates reflecting reasonable value cannot be established for the quarters within these guidelines such cases will be forwarded through channels to the BOB for exception authorization.

6445.7—Quarters Supplied to Visitors. Occasional unofficial visitors need not be charged for the use of Government quarters provided they have a direct interest in Forest Service programs. It will be the responsibility of the local Forest officer to determine whether such individuals have a direct interest in Forest Service activities and act accordingly in furnishing quarters.

* * * *

6445.03—Policy

3. *Required Occupancy.* Forest Supervisors are authorized to require specific employees to occupy Government quarters in accordance with FSM 6445.03.

Requiring an employee to live in a Government dwelling at a certain location shall be done only when there is no other way to acquire a specific service or that Government property cannot be adequately protected. Supervisors will determine these requirements on a case by case basis in conformance with the WO policy. Employee(s) will receive written notification of such a requirement.

6445.03—Policy

House Trailers. Government-owned house trailers and personally owned or rented house trailers of employees may be stationed on administrative sites under the following provisions:

1. The site plan has provision for trailer park facilities.

2. Parking slots, water, sanitary and electrical facilities have been installed in accordance with the approved plan. Trailers must be equipped with connections to these facilities.

3. No use or parking charge will be made for *-personally owned or rented-* trailers of employees.

4. Deductions for Government-furnished utilities will be made in accordance with these instructions.

Existing trailer installations which do not meet the above provisions 1 and 2 are to be discontinued or modified *-as rapidly as funds permit.-* Minimum modifications which will be acceptable must meet the standards for water, sewer, and electrical facilities in FSH R-5 Supplement to 5652.44. Where trailers are used primarily for FRT, KV, BD, and other non-P&M projects, these project funds should be budgeted for this work.

No exceptions will be permitted except by written approval of the Regional Forester.

*-*6445.04—Responsibility.* The Forest Supervisor is responsible for quarters classification according to the standard of struture. In addition, he will determine the amenities present and the distance to the nearest established community.

The Forest Supervisor will assign the appropriate rent rate to each Government quarters according to the Re-

gional schedule. Each quarters rent rate will be based on the quarters classification, the adjustments due to Consumer's Price Index, the amenities present, and the distance to the nearest established community.-*

*-*6445.1—Conditions of Quarters Occupancy*

2. *Occupant Maintenance Responsibility.* Employees occupying Government residences have responsibility for proper maintenance of the building and shall:

a. Notify the proper authority of maintenance needed to prevent damage to the building. Painting needs, leaks in roof, broken or plugged plumbing fixtures, settling of foundations or beams, faulty wiring, evidence of rot, faulty chimneys, and tree limbs resting on roof or against building are examples.

b. Prevent the piling of wood or other material against the exterior of the house.

c. Prevent dirt and debris from being piled against the wood siding. The bottom of the siding should be a minimum of 8" above the ground line.

d. Prevent needless damage to building and equipment.

e. Replace broken glass when tenant negligence is involved.

f. Replace burned-out light bulbs.

g. Repair leaky faucets.

h. Keep tile or other coverings around sinks, bathtubs, and showers properly sealed so water cannot penetrate under covering.

i. Replace furnace filters annually.

j. Oil furnace motor and fan as directed in manufacturer's instructions.-*

k. Have furnace cleaned and adjusted as recommended by the manufacturer (Forest Service to pay the bill).

l. Keep interior of building clean and orderly.

m. Maintain the yard in neat condition by periodic watering and mowing of grass, weeding, proper pruning of shrubs, and disposal of junk and debris. A lot line should be established for each residence to indicate tenant's responsibility.

n. Keep foundation air vents open in summer and closed in winter.

o. Keep gutters and roofs free of leaves and debris.-*

6445.21—Survey Boards. Region 5 Rental Survey Board is composed of the following:

Chief, Division of Operation—Chairman
Chief, Division of Fiscal Control
Chief, Division of Personnel Management.

The duties and responsibilities of the Board are defined in the parent text. This Board replaces the Regional Appeals Committee which was formerly described in R-5 Supplement No. 191(10/60), to FSH 6445.5-6.

6415.23—Survey Procedures

*-2. *Inventorying Government Rentals.* A revised form 6400-1, Individual Government Quarters Inventory, showing the new rental rates will be prepared and maintained in current status by the Forests for each Government rental quarters.-*

As new residential units are constructed or acquired, or as rental rating factors change, two copies of form 6400-1 will be submitted to the Regional Forester for each case. In addition, a recommended rental rate and effective date should accompany the 6400-1. Unless Forests are notified to the contrary, rates and effective dates will be accepted as submitted. *-Following-* is *an exception* to this requirement for advance approval:

Some individual residential units may be used either as crew barracks or for exclusive use by an individual or family. When a change in type of use changes the class of dwelling, a 6400-1 will be submitted for advance approval. Thereafter, as long as occupancy changes *-conform-* to Dwelling Classes already covered by a 6400-1, additional approval will not be required.

a. *Classes of Dwellings*

(1) *Primary Purpose Basis.* Dwelling structures are normally classified on the basis of the primary purpose for which they were designed. For example, a modern 3-bedroom house designed for family occupancy is a Class A structure, while a modern 10-man barracks is Class E, etc. However, at times buildings may be used for purposes other than the primary one—usually on a temporary basis to meet special needs.

As an example of this, off season occupancy of the 10-man barracks by a family as a residence would

call for a temporary classification as a dwelling in the A, B, or C category, depending upon the number of rooms utilized.

(2) *Exclusive versus Non-Exclusive Use.* The questions of exclusive versus non-exclusive use must be considered in establishing dwelling classes and rates. Non-exclusive use permits moving other personnel into a building without approval of the employee or employees already living there. Exclusive use does not permit this. For example, an unmarried patrolman assigned to a *-Class C dwelling-* would pay rent at Class C rates for exclusive use of the building. However, if *-space is available for, or used by-* others, such as members of trail crews, scalers, engineering crews, etc., the quarters should be classified as E and the rate set to conform.

(3) (FSM (4) *Class D*—Trailer houses and transa-homes for family occupancy, heat, electricity, water, bath and toilet facilities). Supervisors are responsible for establishing and changing house trailer rental rates based on instructions in * * * this supplement. *-One hundred square foot increments were used in establishing the following twelve trailer classes. Base rates were computed by extension of comparability, i.e. developing a rate per square foot using comparable classes of private rentals.-*

*-Trailer Class	Size Range
D 1	Under 200 sq. ft.
D 2	200-299 sq. ft.
D 3	300-399 sq. ft.
D 4	400-499 sq. ft.
D 5	500-599 sq. ft.
D 6	600-699 sq. ft.
D 7	700-799 sq. ft.
D 8	800-899 sq. ft.
D 9	900-999 sq. ft.
D10	1000-1099 sq. ft.

*-Trailer Class	Size Range
D11	1100-1199 sq. ft.
D12	1200 and over sq. ft.

In determining size class of trailers compute the number of square feet of gross space inside exterior walls.-*

Temporary modifications of a dwelling to provide for the special needs of a given family will not normally affect the building classification. As a case in point, suppose a Class B, 2-bedroom residence is occupied by a family having need for three sleeping rooms. The fact that they use the living room as a third bedroom will not justify changing the reclassification to A. If they should decide to temporarily enclose a porch to serve as a third bedroom instead of using the living room, the dwelling would still be considered as Class B. However, if a well-designed permanent bedroom were added to the house, it would then become Class A.

Occasionally, substandard and poorly designed modifications of a permanent nature have been added to dwellings in the past. In such instances, the classification must be determined on the basis of the change. Such modifications often justify applying the sub-X classification.

(4) (FSM (6) *Subclass X*). *-Sub-X classification will be considered for-* any dwelling which does not meet the following minimum design, size, or facility requirements. *-Recommendations for changes from Standard to X classification that are premised on sub-standard building design or below-minimum size of rooms will be accompanied by a floor-plan sketch showing room arrangement and interior dimensions, including bathrooms, closets, hallways, and service areas. All recommendations for reclassification to X will be fully substantiated by a detailed justification statement.-*

Each room or space used for living, sleeping, eating, or cooking should have acess to each other room used for one or more of these purposes without having to go outside of the building.

Ceiling heights of all habitable rooms should not be less than 7'6" under joists, beams, or rafters.

Minimum Size of Rooms.

	Separate Rooms					
	Liv. Rm.	Din.* Rm.	Kit.	Total Bdrms.	Min. Bdrms.	Min. Tot. Net Floor Area
Living Unit and 1 Bedroom	160	80	*-60-*	120	None	**550
Living Unit and 2 Bedrooms	160	80	60	200	80	**750
Living Unit and 3 Bedrooms	170	95	70	280	80	**960
Least Dimensions (Feet)	10'	8'	3'6"	—	8'	

** See FSM 5651.62b—2, Amendment No. 141, Nov. 1964 for net area definition.

Dining room separate or combined with living room and/or kitchen as noted in the following table.

Minimum net floor areas per Circular A-18, *-page 1, which is by reference part of FSH 5651.33, Design Standards Handbook.-*

	Square Feet — Combined Rooms		
Rooms	Liv. Rm. & Din. Rm.	Kit. & Din. Space	Liv. Rm. Din. Space & Kit.
Living Units w/1 and 2 Bedrooms	180	100	*-220-*
Living Units w/3 Bedrooms	200	110	250
Least Dimensions (Feet)	—	6'	—

Other habitable rooms—80 sq. ft.; least dimension 8 feet

Minimum Facilities

Electrical System—At least 60-ampere service for a dwelling with 4 or more rooms and not less than 30-ampere service for one with 3 or less rooms (rooms to be counted in accordance with the definitions on page *-1 of Circular A-18.-*).

Bath and Lavatory—A room with tub or shower, lavatory and sink, and with not less than three square feet of window area or a mechanical exhaust system.

Water System—Hot and cold running water in the kitchen and bathroom.

**-6445.3—Establishing Base Rental Rates.* The following base and minimum rates have been established for Region 5, effective March 13, 1966:

Dwelling Class	Base Rate Per Pay Period	Minimum Rate
A	$41.00	$20.50
AX	31.00	15.50
B	34.00	17.00
BX	27.50	13.50
C	26.50	13.00
CX	18.50	9.00
D1	6.50	3.00
D2	8.00	4.00
D3	12.50	6.00
D4	16.00	8.00
D5	17.00	8.50
D6	18.50	9.00
D7	21.50	10.50
D8	27.00	13.50
D9	30.50	15.00
D10	34.00	17.00
D11	37.50	18.50
D12	41.00	20.50
E	7.50	7.50
EX	5.50	5.50

Sub-standard trailers or transa-homes or those acquired as surplus from other agencies may be classed as sub-X. Supervisors may establish a DX classification for classes D1 through D12, depending on their condition. Pay period rates for sub-X class trailers will be 50% of the accessibility adjusted rate for that particular class of trailer. Sub-X classification will not apply to trailers purchased as new units.

6445.32—Base Rates for Classes not Sampled

1. *Dwellings smaller than Class CX structures.* In establishing rental rates for one and two room cabins

used on an exclusive occupancy basis, such as scaler and lookout dwellings, use the following criteria:

a. Treat the dwelling as a house trailer. Based on the number of square feet of gross space classify it as D1, D2, D3, D4, or D5 and use the corresponding base rate.

b. No adjustment will be made for amenities.

As with house trailers under this procedure Class D base rates may be adjusted for accessibility only.-*

**-6445.42—Adjustment for Amenities.* The following are the Region 5 average amenity ratings as derived from private rental samples:

Dwelling Class	Rating
A	13
AX	13
B	13
BX	12
C	13
CX	12

These average ratings will be used to determine point differences for individual Government dwellings. The amenity adjustment (plus or minus) can then be derived from the following table:

Dwelling Class	Base Rate	Rating Difference and Allowable Adjustment									
		±1	±2	±3	±4	±5	±6	±7	±8	±9	±10
A	41.00	$.82	$1.64	$2.46	$3.28	$4.10	$4.92	$5.74	$6.56	$7.38	$8.20
AX	31.00	.62	1.24	1.86	2.48	3.10	3.72	4.34	4.96	5.58	6.20
B	34.00	.68	1.36	2.04	2.72	3.40	4.08	4.76	5.44	6.12	6.80
BX	27.50	.55	1.10	1.65	2.20	2.75	3.30	3.85	4.40	4.95	5.50
C	26.50	.53	1.06	1.59	2.12	2.65	3.18	3.71	4.24	4.77	5.30
CX	18.50	.37	.74	1.11	1.48	1.85	2.22	2.59	2.96	3.33	3.70

Use form R5 6400-21 (sample attached) to determine amenity rating for each Government rental quarters (except class D and E).

SAMPLE

AMENITIES RATING

Identification				
Type	Forest #	District #	Building or Sample #	Residence Class
☒ Government Rental	02	54	1001	A
☐ Private Sample				

Number	Description	Present	Not Present
1	Paved Streets	x	
2	Street lights		x
3	Sidewalk		x
4	Lawn, trees, and landscaping	x	
5	General attractiveness of the neighborhood	x	
6	Community sanitation service		x
7	Reliability and adequacy of water service	x	
8	Reliability and adequacy of electrical service	x	
9	Reliability and adequacy of telephone service	x	
10	Reliability and adequacy of fuel	x	
11	Police protection	x	
12	Fire protection	x	
13	Unusual design features		x
14	Absence of noises and odors	x	
15	Standard of maintenance		x
	AMENITIES RATING (Total of those present)	10	

*-*6445.43—Adjustments for Accessibility.* Adjustments in rental rates charged employees were made in accordance with accessibility factors as shown in the parent text and are reflected in the following tables. Accessibility adjustments apply to all classes except class E quarters. In no case will rental rates be established below minimums shown on the following table.

In order that accessibility adjustments be applied uniformly throughout the Region, specific standards have been set up for established communities. An established community is well defined in FSM 6445.05.

The following is a list of established communities which will be used to determine accessibility adjustments in Region 5.

Forest	Established Community	Forest	Established Community
Angeles	Arcadia	Los Padres	Arroyo Grande
	Azusa		Bakersfield
	Glendora		Cambria
	La Canada		Carmel
	Montrose		Fillmore
	Newhall		King City
	Palmdale		Meiners Oaks
	Pasadena		Morro Bay
	San Bernardino		Ojai
	San Dimas		San Luis Obispo
	Sunland		Santa Barbara
	Sylmar		Santa Maria
	Upland		Solvang
Cleveland	Corona		Taft
	El Cajon	Mendocino	Corning
	Elsinore		Lakeport
	Escondido		Ukiah
	Hemet		Willits
	Orange		Willows
	San Juan Capistrano	Modoc	Alturas
Eldorado	Jackson		Klamath Falls, Ore.
	Placerville		Lakeview, Ore.
	South Tahoe City	Plumas	Oroville

Forest	Established Community	Forest	Established Community
			Portola
			Quincy
			Susanville
Inyo	Bishop	San Bernardino	Banning
	Lone Pine		Big Bear Lake
Klamath	Klamath Falls, Ore.		Fontana
	Weed		Hemet
	Yreka		Lake Arrowhead
Lassen	Burney		San Bernardino
	Chester		Upland
	Chico		Yucaipa
	Fall River Mills	Sequoia	Bakersfield
	Red Bluff		Exeter
	Redding		Kernville
	Susanville		Porterville
	Westwood		Sanger
Shasta-Trinity	Anderson	Six Rivers	Arcata
	Burney		Crescent City
	Central Valley		Eureka
	Dunsmuir		Fortuna
	Mt. Shasta	Stanislaus	Angels Camp-Altaville
	Redding		Sonora
	Weaverville	Tahoe	Auburn
Sierra	Clovis		Loyalton
	Fresno		Nevada City
	Madera		Truckee
	Mariposa		
	Sanger		

*-6445.43—*Rental Rates Adjusted for Accessibility*—Effective March 13, 1966.

Dwelling Type	Dwelling Class	Base Rate	Minimum Rate	Accessibility Group & Pay Period Rental Rates			
				Group 1	Group 2	Group 3	Group 4	Group 5
Residence	A	$41.00	$20.50	$41.00	$34.00	$29.50	$25.00	[1]$20.50
	AX	31.00	15.50	31.00	24.00	19.50	[1]15.50	15.50
	B	34.00	17.00	34.00	27.00	22.50	18.00	[1]17.00
	BX	27.50	13.50	27.50	20.50	16.00	[1]13.50	13.50
	C	26.50	13.00	26.50	19.50	15.00	[1]13.00	13.00
	CX	18.50	9.00	18.50	11.50	[1] 9.00	9.00	9.00
Trailers - Transa-Homes	D1	6.50	3.00	6.50	[1] 3.00	3.00	3.00	3.00
	D2	8.00	4.00	8.00	[1] 4.00	4.00	4.00	4.00
	D3	12.50	6.00	12.50	[1] 6.00	6.00	6.00	6.00
	D4	16.00	8.00	16.00	9.00	[1] 8.00	8.00	8.00
	D5	17.00	8.50	17.00	10.00	[1] 8.50	8.50	8.50
	D6	18.50	9.00	18.50	11.50	[1] 9.00	9.00	9.00
	D7	21.50	10.50	21.50	14.50	[1]10.50	10.50	10.50
	D8	27.00	13.50	27.00	20.00	15.50	[1]13.50	13.50
	D9	30.50	15.00	30.50	23.50	19.00	[1]15.00	15.00
	D10	34.00	17.00	34.00	27.00	22.50	18.00	[1]17.00
	D11	37.50	18.50	37.50	30.50	26.00	21.50	[1]18.50
	D12	41.00	20.50	41.00	34.00	29.50	25.00	[1]20.50
Barracks	E	7.50	7.50	7.50	7.50	7.50	7.50	7.50
	EX	5.50	5.50	5.50	5.50	5.50	5.50	5.50 -*

[1] Minimum pay period rental rate—no adjustment below this level.

NOTE: Pay period rental rates for sub-X class trailers will be 50% of accessibility group rates shown above.

*-*6445.44—Adjustment for Space Devoted to Official Use.*

Advanced approval of the Regional Forester will be necessary for all adjustments in connection with space devoted to official use. Requests for such adjustments must include a detailed justification statement. Also each statement should list the total floor space of the dwelling and the square feet of floor space to be used for official purposes.-*

6445.45—Adjustments for Individual Occupants

-For other rental rate adjustments see FSM 6445.45. Advance approval of the Regional Forester will be necessary for all adjustments other than those delegated to Supervisors by this supplement. A detailed justification statement will accompany all adjustment requests.-

1. *Adjustment for Size*

a. *Space in Excess of Employee Needs.* Where the space available is in excess of an employee's needs, rental rate may be adjusted in accordance with item *1, FSM 6445.45.-* In applying such adjustments the following guidelines will be observed.

(1) Excess rooms for which no rent is charged will not be occupied or used for storage of personal effects.

(2) Excluded space will normally be designated as whole rooms.

(3) Where more than one employee qualifies for rental of a Government dwelling, preference will be given to the one who can make full use of the building, other conditions being equal.

*-*6445.5—Other Charges-**

*-1. *Utilities.* Deductions for Government-furnished utilities should be reviewed and changed as necessary at the time new base rental rates are established. Utilities deductions should reflect the average minimum rates charged by companies serving local areas. Supporting data used to establish utility rates will be filed in the

Superivsor's Office. Operating costs in excess of amounts recovered from employees will be paid from benefitting Forest funds. Combined deductions for utilities will be adjusted to the nearest $.50, but the resulting charge will not be less than $1.00 per pay period.

Salary deductions must be made for Government-furnished utilities except at quarters being used as crew barracks, or in lookout observatory rooms.-*

b. *Electricity.* Where a Government-owned light plant furnishes electricity to rental quarters, the family or families concerned will each be subject to salary deductions based on average minimum domestic rates charged by utility companies for that general area.

d. *Water.* See FSM 6445.5, item 1d.

e. *Gas.* Where residents and family trailers are connected to central storage facilities for liquid petroleum gas (butane) and separate meters are provided for each, this arrangement may be continued if the supplier will read the meters at the time of delivery and bill each user for the gas he has used. Otherwise, such users will be disconnected from the central storage facilities and required to make their own arrangements for gas supply and storage at their own expense.

2. *Furnishings.* In some cases, Government-owned furniture and equipment, in excess of that listed in item 2 of FSM 6445.5, has been provided in rental quarters. An inventory of such items shall be maintained at each Supervisor's Office. This inventory will show the known or estimated original cost of each major item and the estimated total cost of miscellaneous minor items such as cooking utensils. A copy of this inventory should be posted in each of the quarters concerned.

Charges for furnishings will be made according to the table below. No deductions will be made for built-in furnishings or for furnishings in crew barracks when used as such.

Total Original Cost of Furnishings	Pay Period Deductions
$ 1.00 to $ 149.00	No charge
150.00 to 280.00	$ .50
281.00 to 466.00	1.00
467.00 to 651.00	1.50
652.00 to 837.00	2.00
838.00 to 1,023.00	2.50

3. *Miscellaneous Items.* Base shelter rates include garage with residences. No additional charge will be made for a garage. However, the absence of a garage will not reduce the rental rate.

4. *Quarters Deductions*

a. *Summary of Quarters and Other Deductions.* A current record (Form R5 6400-3, sample attached) will be maintained in the Forest Supervisor's Office, showing for each rental unit the location, accessibility and dwelling class, and pay period deductions for rent, utilities, and furnishings. This record will eliminate the use of Form 6400-5. * * * One copy of all Forms R5 6400-3 will be sent to the Regional Office at the time of each 3-year reappraisal of rental rates.

No change will be made in quarters deductions during periods of leave or details where the employee is not asked to vacate the quarters.

b. *Free Occupancy During Periods of Non-employment.* Under Regulation U-11 (FSM 2711.2) the free occupancy of Government-owned buildings may be allowed when such occupancy would afford protection against fire, trespass, or other damage. This would apply particularly in cases where steady employment cannot be given during non-field season periods. At the discretion of the Supervisor, the free occupancy of a building in accordance with the above (where no salary for custodial services is involved) need not be covered by special use permit, but may be covered by a letter written to the individual outlining the conditions of occupancy.

c. *Quarters Occupancy Non-official.* From time to time an employee and family may occupy a Government building while not on official business. There is no objection to such occupancy if the building is not required for official purposes during this period.

As a general policy, such use by employees and families for vacation and relaxation is encouraged so long as the policy outlined below is followed:

(1) Employee use will be incidental to official use; i. e., buildings will not be retained solely for employee use. This may mean that a station although not officially occupied may be needed in subsequent years when financing permits or a building may be occupied intermittently by work crews, etc. If there is no foreseeable official need for a building in its present location, action should be taken to move it to another location where it is needed—if practical —or dispose of it through excess property channels.

(2) When used by employees, a * * * charge shall be made as follows:

Small one- or two-room-cabins	$1.00 per day
All larger buildings	— 2.00 per day

-These charges will be collected directly from the employee. Payroll deductions will not be made. The Forest responsible for the facility shall issue the Bill for Collection, Form 6500-89. The bill must show the period of occupancy, rate of deduction, and total charge. Deposit will be made to 121830, Rent of Real Property, not otherwise classified. (FSM 6531.11e).-

(3) Forest Supervisors may be asked periodically to report on approximate dates when quarters will be available for employee use.

d. *Leased Rental Quarters.* Standard rental rates will apply to privately owned quarters which are leased by the Government and rented to employees,

regardless of the lease rate paid by the Government. This applies to all leased quarters that are used for either exclusive occupancy or barracks purposes. Prior approval of the Chief of Operation is required in each case. The request should include a justification showing why employees cannot rent the property directly from the owner. This can be justified when it is for transient use where there are no available transient facilities for rental by travelers. In other cases where housing shortages exist, landlords may be unwilling to rent on a partial-year basis.

RENTAL RATE AND QUARTERS DEDUCTIONS SUMMARY
(Sample)

DATE: 4/4/66 FOREST Los Padres

Forest Building Number	Ranger District	Name of Station or Location	Quarters Class	Access Group	Deductions for Pay Period				R.O. Appvd. Adjust.	Total Deducts Per Pay Period
					Qtrs. [1]	Furnishing	Elect.	Water		
332	Cuyama	White Oaks	C	5	13.00	None	2.00	1.00	None	16.00
351	"	" "	E	N/A	7.50	N/A	N/A	N/A	None	7.50
610	"	Ventucopa	AX	4	15.50	None	None	1.00	None	16.50
620	"	"	B	4	17.00	None	1.00	1.00	None	18.00
630	"	Ozena	A	4	21.50	1.50	2.00	1.00	None	26.00
650	"	Ventucopa	E	N/A	7.50	N/A	N/A	N/A	None	7.50

[1] Includes amenity adjustment.

DEFENDANT'S EXHIBIT A

Received Mar. 20, 1967; Assessor

STATE OF CALIFORNIA [SEAL]
STATE BOARD OF EQUALIZATION
1020 N Street, Sacramento, California
(P.O. Box 1799, Sacramento, California 95808)

March 17, 1967

TO COUNTY ASSESSORS:

DISTRICT COURT AFFIRMS TAXABLE POSSESSORY INTEREST OF EMPLOYEE IN RESIDENCE OWNED BY AN EXEMPT BODY

In *McCaslin* v. *DeCamp* 248 A.C.A. 16 (January 20, 1967), the Fifth District Appellate Court affirmed that an employee of an irrigation district who is paying rent for the exclusive use and possession of a family residence owned by the irrigation district has a taxable possessory interest in the property.

The district and its employee alleged that the employee did not have a possessory interest. They argued that he occupied the district's property as an employee at the request of the district and in connection with his employment. According to their argument, the property was being used for the district's purposes, entitling it to tax exempt status.

The court noted that the employee is paying a rental and is occupying the residence with his family. It concluded that this exclusive use and possession is sufficient to create a possessory interest even though his employment can be terminated by the district.

At this date the time for the Supreme Court to grant a hearing has not expired. We have enclosed a copy of the Appellate Court's decision.

Sincerely,

/s/ Jack F. Eisenlauer, Chief
JACK F. EISENLAUER, Chief
Assessment Standards Division

JFE:jn
Enc.

IN THE COURT OF APPEAL
FIFTH APPELLATE DISTRICT
STATE OF CALIFORNIA

5 Civil No. 668

LEWIS V. MCCASLIN, et al.,
PLAINTIFFS AND APPELLANTS
v.

F. L. DECAMP, et al.,
DEFENDANTS AND RESPONDENTS

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. William Zeff, Judge. Affirmed.

Action to declare an assessment void and to enjoin collection of resulting tax.

C. Ray Robinson and William T. Ivey, Jr. for Plaintiffs and Appellants.

Frederick W. Reyland, Jr., County Counsel, Clayton M. Ham, T. W. Martz and Jonathan H. Rowell, Deputy County Counsel, for Defendants and Respondents.

Plaintiffs Central California Irrigation District, a tax-exempt public agency (hereafter referred to as the district), and Lewis V. McCaslin (hereafter referred to as McCaslin) commenced this action by filing a complaint in the Superior Court of Stanislaus County against the assessor, the tax collector and the board of supervisors of said county, to declare void a possessory interest assessment made by the assessor, to enjoin collection of the resulting tax levied against this interest and to enjoin the defendants from making similar assessments in the future. According to the allegations of the original complaint, the district, on the first Monday of March 1965, owned a single-family residence which was occupied by district employee McCaslin and his family. McCaslin was paying the district a monthly rental for the use and occupancy of this residence, and claimed no interest therein "other than as a tenant on a month-to-month basis."

In 1965 McCaslin was assessed as the owner of a possessory interest in this residence, and a tax was levied against his possessory interest. The defendants demurred to the plaintiffs' complaint and the demurrer was sustained with leave to amend. Plaintiffs then filed a first amended complaint, omitting therefrom the allegations that McCaslin paid the district a monthly rental for the premises and that he claimed no interest therein "other than as a tenant on a month-to-month basis." (They merely alleged that McCaslin claimed no interest in the property.) They further alleged that McCaslin occupied the residence at the district's request in connection with his duties as a district employee, and that the district could terminate his occupancy without notice. Defendants' demurrer to the first amended complaint was sustained without leave to amend. Accordingly, judgment was granted in favor of the defendants and the plaintiffs appealed.

In support of the trial court's ruling sustaining their demurrer without leave to amend, defendants contend that the facts alleged in the plaintiffs' first amended complaint disclose that McCaslin had a possessory interest in the district's property in 1965 when the assessment was made, and that at best plaintiffs are complaining of an erroneous (but not void) assessment. They therefore, argue that if McCaslin was dissatisfied with the assessment he should have appealed for relief (pursuant to the provisions of Chapter 1, Division 1, Part 3, commencing with section 1601 of the Revenue and Taxation Code) to the board of supervisors of Stanislaus County sitting as the county board of equalization; and since the complaint fails to allege that he did so, it does not state a cause of action for the judicial relief requested. It is the general rule that a taxpayer seeking judicial relief from an erroneous assessment must exhaust his remedies before the administrative body empowered initially to correct the error before seeking judicial review. (*Security First Nat. Bk.* v. *County of L. A.*, 35 Cal.2d 319, 71 S.Ct. 207 [cert. den.].)

Plaintiffs urge, however, that McCaslin did not have a taxable interest, possessory or otherwise, in the district's

property in 1965 (and that the complaint so indicates); consequently, plaintiffs' sole contention is that the possessory interest assessment made by the defendant county assessor was totally void. Thus, plaintiffs readily admit that McCaslin did not apply for relief to the county board of equalization. They simply assert that McCaslin was not required to do so because the general rule relied upon by defendants is inapplicable where, as here, the assessment is against non-existent property. As stated in *Star-Kist Foods, Inc.* v. *Quinn*, 54 Cal.2d 507, 510:

> ". . . Prior application to the local board of equalization has not been required, however, in certain cases where the facts were undisputed and the property assessed was tax-exempt (*Brenner* v. *City of Los Angeles*, 160 Cal. 72, 79-80 [116 P. 397]; *Parrott & Co.* v. *City & County of San Francisco*, 131 Cal.App.2d 332, 342 [280 P.2d 881]), outside the jurisdiction (see *Kern River Co.* v. *County of Los Angeles*, 164 Cal. 751, 755-756 [130 P. 714]), or non-existent (see *Pacific Coast Co.* v. *Wells*, 134 Cal. 471, 473 [66 P. 657]; *Associated Oil Co.* v. *County of Orange*, 4 Cal.App.2d 5, 9, 11 [40 P.2d 887])."

Consequently, the only question presented in this appeal is whether the facts alleged in the plaintiffs' complaint disclosed that McCaslin had a possessory interest in the district's property as defendants contend, or whether said facts indicate that he had no taxable interest therein as plaintiffs contend.

It is clear that leasehold and similar possessory interests in tax-exempt land or improvements are taxable property rights under the California Revenue and Taxation Code (Revenue and Taxation Code sections 103, 104, 107). Furthermore, the validity of such assessments has long been upheld by the appellate courts of this state. (*State of California* v. *Moore*, 12 Cal. 56; *People* v. *Shearer*, 30 Cal. 645; *L. E. White Lumber Co.* v. *Mendocino*, 177 Cal. 710; *Kaiser Co.* v. *Reid*, 30 Cal.2d 610; *Hammond L. Co.* v. *County of Los Angeles*, 104 Cal.App. 235.) In fact, in *Tilden* v. *County of Orange*, 89 Cal.

App.2d 586, 587-588, the court, in discussing the assessment of possessory interests, had this to say:

> "The general rule is that there can be but one assessment of the entire estate in real property, which assesment includes the value of both the estate for years and the remainder or reversion, and the mortgagor or lessor of the real estate is liable for the taxes thereon. (*Graciosa Oil Co.* v. *County of Santa Barbara*, 155 Cal. 140, 143 [99 P. 483, 20 L.R.A. N.S. 211]; *Central Manufacturing District* v. *State Board of Equalization*, 214 Cal. 288, 293 [5 P.2d 424].) There is an exception to the rule where the reversion is exempt from taxation, as where the land is owned by the state or a municipality. In such case the possessory right in the public land is private property and may be assessed for purposes of taxation to the person in possession. (*San Pedro etc. R. R. Co.* v. *Los Angeles*, 180 Cal. 18, 23 [179 P. 393].) The possession itself of public lands and the improvements thereon is a valuable property interest and is assessable. (*Kaiser Co.* v. *Reid*, 30 Cal.2d 610, 618 [184 P.2d 879].)
>
> "Where there is a lease of land owned by the state or municipality, the reversion being exempt from taxation, the usufructuary interest alone is subject to tax in proportion in its value; . . ."

As we have indicated, plaintiffs do not dispute the county's power to assess possessory interests. To the contrary, they admit in their brief that "it is clear that when property owned by a tax-exempt agency is *rented or leased to an individual*, the estate of the private tenant or lessee may be assessed and taxed." Thus, plaintiffs' own admission is determinative of the issues presented in this appeal. This follows for they alleged in their original verified complaint that McCaslin paid the district a monthly rental for the use and occupancy of the defendants' single-family residence, and that *he claimed no interest therein other than as a tenant on a month-to-month basis.* It is settled that if a verified pleading

contains an allegation which renders a complaint vulnerable, the defect cannot be cured by simply omitting the allegation without explanation in a later pleading. (*Wennerholm* v. *Stanford Univ. Sch. of Med.*, 20 Cal.2d 713; *Williamson* v. *Joyce*, 137 Cal. 151.)

We will nevertheless consider plaintiffs' arguments in support of their contention that their pleadings allege sufficient facts from which it may be concluded that McCaslin did not have a possessory interest in the district's property in 1965 when the possessory interest assessment was made. In this respect, they state that it is so because they have alleged that McCaslin occupied the district's property as an employee at the complete sufferance of the district, and further that he occupied the property at the district's request in connection with his employment by the district and therefore the property was being used for a district purpose, entitling it to its tax-exempt status.

Plaintiffs' arguments are without merit. According to the pleadings, McCaslin was occupying the premises as a district employee and in connection with his duties. Moreover, for the purpose of this appeal, we will assume that his employment could be terminated at the will of the district and that this in turn would terminate his right to occupy the premises. It is also apparent from the pleadings, however, that McCaslin was occupying the district's single-family residence with his family and that he was paying a monthly rental therefor. Therefore, until actual termination of his employment by the district he had the exclusive use and possession of the premises for a residence, not only for himself but for the members of his family as well.[1] This exclusive use and possession was sufficient to create a possessory interest even though conditioned on McCaslin's employment, which

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[1] In *San Francisco, etc. Soc.* v. *Leonard*, 17 Cal.App. 254, the court held that although the employee's right to possession to the employer's premises terminated by virtue of the termination of his employment, he could not be driven off of the premises, and if the employer had done so it would have been guilty of a forceful entry.

could be terminated by the district.[2] This is true for the test is not whether the tax-exempt agency has a right to terminate the tenancy or occupancy, or whether the taxpayer has a non-transferable interest, but whether he has the exclusive use and possession of the property against all the world, including the owner. (*Kaiser* v. *Reid, supra*, 30 Cal.2d 610.) In other words, if the employee's right to the use and possession of the employer's real property is in common with other employees, or if it is subordinate to the right of possession of the employer, the employee's right is a mere permit or license which is not taxable. But, if his use and possession are exclusive to others, including the employer, and particularly when he is paying rent therefor, it is a possessory interest under Revenue and Taxation Code 107, and the right of the employer to terminate the employment and hence the occupancy is only a factor to be considered in fixing its value (*Rand Corp.* v. *County of Los Angeles*, 241 A.C.A. 711).[3] As stated in *Kaiser, supra*, 30 Cal.2d 610, 619,

> "Such provisions for cancellation and termination, however, did not establish plaintiff's right to use the shipyards as no more than a permit or license which could not be responsible for a 'property' tax. As stated in *Von Goerlitz* v. *Turner*, 65 Cal.App.2d 425, at page 429 [150 P.2d 278]: 'The test . . . "whether an agreement for the use of real estate is a license or a lease is whether the contract gives *exclusive possession of the premises against all the world, including the owner*, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument."' . . ."

[2] Even though the right of possession may have been created by the employment relationship, it is well settled that for the purpose of taxation the definitions of real property in the Revenue and Taxation laws of the state control whether they conform to definitions used for other purposes or not. (*Trabue Pittman Corp.* v. *County of L.A.*, 29 Cal.2d 385.)

[3] In *Rand Corp.* v. *County of Los Angeles*, 241 A.C.A. 711, 714, the court said:

> ". . . The right to cancel 'in the best interests of the Government' did not destroy the exclusiveness of Rand's possession."

Plaintiffs' argument relating to the use of the district's property for a district purpose is similar to those voiced in the past by other taxpayers and unequivocally rejected by our Supreme Court. For example, in *Kaiser*, the taxpayer was using government-owned shipyards to build ships for the use of the government. Thus, the government property was obviously being used for a government purpose. However, there as here, the assessment was not against the government nor against government property. It was against the private party's usufructary right in tax-exempt public property.

Since plaintiffs' complaint clearly indicates that McCaslin had a possessory interest in the district's property in 1965 when the possessory interest assessment was made by the defendant county assessor, the court correctly sustained the defendants' demurrer without leave to amend.

The judgment is affirmed.

GARGANO, J.

We concur:

CONLAY

illegible

DEFENDANT'S EXHIBIT B

[SEAL]

OFFICE OF THE ASSESSOR
201 Hall of Records

GERALD B. GARD
County Assessor

P.O. Box 1146
Fresno, California 93715

On January 20, 1967 the Fifth District Appellate Court (McCaslin Vs. DeCamp 248 A.C.A. 16) affirmed that an employee of a tax-exempt district, having exclusive use and possession of a family residence owned by the district, has a taxable possessory interest in the property. In order to conform with this decision and enroll all similar possessory interests, we hereby request that you supply the following information:

1. Name and mailing address of each occupant having exclusive use and possession of district owned property within Fresno County.
2. Address or description of parcel so occupied.
3. Rental paid, if any. Please specify if housing is furnished as part of salary consideration.
4. Term of occupancy. Please specify if occupancy is a condition of employment.
5. Would termination of employment terminate right of occupancy?
6. Is occupied parcel used for district purposes other than housing of employee and family? If so, specify type of use.

We realize that the assessment of a possessory interest to your tenants may be of concern to you, but we are also concerned that the Assessor fulfills his constitutional mandate to assess all legally assessable property. We shall be happy to answer any questions you may have regarding this matter and shall appreciate an early response to our request.

Yours very truly,

G. B. GARD
County Assessor

By /s/ Barrie W. Canfield
Barrie W. Canfield
Assistant Assessor

DEFENDANT'S EXHIBIT C

[Received May 5, 1967, Assessor]

UNITED STATES DEPARTMENT OF AGRICULTURE

Office of the General Counsel
Room 860, Appraisers Building
630 Sensome St., San Francisco, California 94111

May 4, 1967
In reply refer: HMW

Mr. G. B. Gard, County Assessor
Office of the Assessor
201 Hall of Records
P.O. Box 1146
Fresno, California 93715

Attention: Barrie W. Canfield, Assistant Assessor

Dear Sir:

Your letter of April 5, 1967 addressed to the Supervisor of the Sierra National Forest has been referred to us for reply.

You requested certain information with respect to Forest Service employees occupying Government-owned housing in order to determine whether a possessory interest tax should be assessed on those employees.

Attached is a list prepared by the Forest Supervisor showing the employees affected, the description of the houses occupied, the rental paid biweekly, and the term of occupancy. We are also attaching copies of the memoranda from the Forest Supervisor to these various employees making occupancy of the houses in question a requirement of their employment. These attachments answer the first four questions of your letter.

In answer to your fifth question, termination of employment would in all cases terminate the right of occupancy. However, we should like to point out that this right of occupancy can be terminated by the Forest Service for other reasons. The employee's right of occupancy is entirely subordinate to the right of possession of the U.S. Forest Service. The dwelling can be converted to other administrative use, or reassigned to other employees whenever the circumstances so dictate. The Forest Service must make the best use of the houses available for the personnel needing housing and for other uses for which the Forest Service might need quarters.

The residences are generally assigned on the basis of job responsibilities, that is, normally the District Ranger and Fire Control Officer are assigned quarters because of the potential prompt need for their services at any hour of the day. This is specifically important during fire season. Also, prompt action is needed for search and rescue missions.

In answer to your sixth question, although the houses are generally assigned for occupancy of the employee and his family, experience indicates that the public does not recognize the exclusive use of the employee when he resides in an identified Forest Service house at a station. There seems to be little hesitancy on the part of the public to come upon the premises or in the house, sometimes without knocking, at any time of day or night to get information or a permit, use the telephone, or seek first aid when an office is not available or open. All of the quarters included in the attached list are subject to such invasion of privacy to a more or less degree. In fact, the Supervisor has advised us that this problem has become so disruptive to the employee and his family at a Ranger Station in another County, the Ranger has asked permission to move out of the house.

This question of a possessory interest tax was raised in 1964 in another County, at which time the Attorney General of the United States expressed an interest in the matter and requested to be kept advised. We feel that such a possessory interest tax on Forest Service employees would not be in order. If such a tax were levied,

this office no doubt would advise the employees to pay the tax under protest and to make claim for refund. We would then refer the matter to the Attorney General of the United States for his decision as to whether the matter should be litigated.

We shall appreciate receiving a reply from you as to whether you do or do not intend to assess a possessory interest tax to the employees shown on the attached list and the basis for your decision. It is hoped the information contained herein will be of assistance to you, and should you desire any additional information, we shall be glad to endeavor to supply it.

Sincerely yours,

William L. Anderson
Acting Regional Attorney

By /s/ William L. Anderson
Attorney

HMWaters:eb

cc: Attorney General,
Attn. William Massar

cc: U.S. Attorney

cc: L. M. Adams, OGC

cc: Supervisor, Sierra NF

cc: FS, L. P. Wilsey

Las Clark A

	Name and Address of Occupant Having Use of F.S. Property Within Fresno County	Description of Property Occupied	Rental Paid Biweekly	Term of Occupancy
Void- Visited June	Arnold P. Snyder 430-234-13 4774 E. Indianapolis Fresno, Calif. 93726	#1020 - 3 rooms; 1230 sq. ft.	*	4/13-10/9
Trailer	Allan Campbell, III 4831 E. Shields Ave. 440-380-20 (?) Fresno, Calif. 93726	#1021 - 3 rooms; 1230 sq. ft.	*	4/13-10/9
Lot 39	Robert N. Thompson Box 38, Big Creek, Ca. 93605 ? 110'	#1012 - 8 rooms; 1248 sq. ft.	110-500-54P $20.50**	Yearlong
Lot 59	Joel M. Criswell Box 38, Big Creek, Ca. 93605 ?	#1010 - 6 rooms; 1200 sq. ft.	110-520-24 P $16.50**	Yearlong
12	Donald J. Cooley 120-380-Lot 1 Box 61, Shaver Lake, Ca. 93644 ?	#1009 - 5 rooms; 1024 sq. ft.	120-380-52 P $14.50**	Yearlong
11	Adolph E. Prochaska Box 286, Auberry, Ca. 93602 ?	#1008 - 6 rooms; 800 sq. ft.	118-400-17 P $17.00**	-Yearlong
	Paul T. Meischke Trimmer Route Sanger, Calif. 93657 ?	#1000 - 6 rooms; 1500 sq. ft.	$23.50**	10/15-4/28
		#1022 - 4 rooms; 832 sq. ft.	$10.00**	4/29-10/14
13	Richard L. Nichols Trimmer Route Sanger, Calif. 93657 ? 158-050-13T	#1019 - 6 rooms; 1294 sq. ft.	$23.50**	Yearlong
	William P. Cook Trimmer Route Sanger, Calif. 93657 ?	#1036 - 4 rooms; 792 sq. ft.	155-[illegible]-31P $18.00**	Yearlong

* Pay only a utility charge of $.10 per day
** Rental is on a payperiod (2-week) basis and includes charges for utilities (approx. $1.00 per payperiod).

Lot 18 Charles Goughnour Big Creek, Calif 118-500-55P

John R. Baswell Auberry Calif #302 118-400-18P

[illegible] 1 1957
Date

[illegible]
Forest Supervisor

BEST COPY AVAILABLE

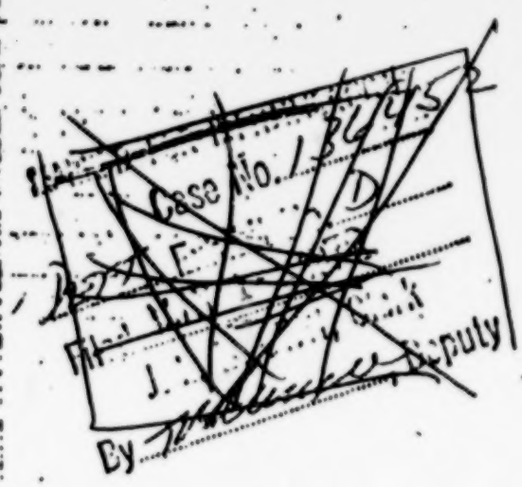
DEFENDANT'S EXHIBIT D

U.S. Dept. of Hq. Sequoia National Forest

OG. 6/16/6

DUPLE William S. Swanson, Miramonte, Calif 195-120-24 P	Cabin # 104 Pinehurst R.S.	Distance 1000
Paul Spivey (William McBain) Miramonte, Calif 195-120-21 P	Cabin # 109 Pinehurst R.S.	1121
Jesse R. Luna Miramonte Calif 195-120-20 P ✓✓	Cabin # 110 Pinehurst R.S.	1120
Lawrence L. Cabodi Miramonte, Calif 195-120-25P ✓✓	Cabin # 1135 ✓ Pinehurst R.S	1135
FERNEAU George A. Landrum, Miramonte, Calif 195-180-20 P ✓✓	Cabin # 1133 ✓ Pinehurst R.S.	1153
Harold F. Sebring Jr. Miramonte, Calif 195-120-22P ✓✓	Cabin # 1014 Pinehurst R.S.	1014
1/19/76 DONE Thomas Adams Miramonte, Calif 195-120-23 P ✓	Cabin # 103 Pinehurst R.S.	1119

DONALD SPENCE 31.76
ANEHURST



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DEFENDANT'S EXHIBIT E

Fresno County Assessor's Office 10/23/70

Name	Tax Area Code	Account Number	1967 Assessor's Parcel Number	2c	2c1 & 2c2	2c3	2c4	Imputed Rent Monthly Basis
Paul T. Meishke	668-00	17826	153-050-33P	Possessory Interest	Residence in Sec. 12 T12S, R24E & site	209	-0-	65/M
Donald J. Cooley	606-00	17293	120-380-52P	Possessory Interest	Residence in Lot #1 Musick Creek & site	176	-0-	90/M
Robert N. Thompson	606-00	17280	110-500-54P	Possessory Interest	Residence in Lot 11 Big Creek & site	242	-0-	125/M
Herbert J. Kendall	668-00	17827	153-050-34P	Possessory Interest	Residence in Sec. 12 T12S, R24E & site	209	-0-	65/M
Charles Goughnour	606-00	17281	110-500-55P	Possessory Interest	Residence in Lot 28 Big Creek & site	154	-0-	85/M
Joel M. Criswell	606-00	17285	110-520-24P	Possessory Interest	Residence in Lot 37 Big Creek & site	187	-0-	50/M
Richard L. Nichols	668-00	17829	153-050-36P	Possessory Interest	Residence in Sec. 12 T12S, R24E & site	209	-0-	65/M
William P. Cook	668-00	17825	153-050-31P	Possessory Interest	Residence in Sec. 12 T12S, R24E & site	143	-0-	50/M

Name	Tax Area Code	Account Number	1967 Assessor's Parcel Number	2c	2c1 & 2c2	2c3	2c4	Imputed Rent Monthly Basis
John R. Boswell	604-00	17292	118-400-18P	Possessory Interest	Residence #302 Auberry & site	77	-0-	40/M
F. Weldon Sharp	668-00	17828	153-050-35P	Possessory Interest	Residence in Sec. 12 T12S, R24E & site	209	-0-	65/M
Frank E. Crane	668-00	17830	153-050-37P	Possessory Interest	Residence in Sec. 12 T12S, R24E & site	77	-0-	35/M
Robert Zuritz	668-00	17824	153-050-30P	Possessory Interest	Residence in Sec. 12 T12S, R24E & site	66	-0-	30/M
Paul Spivey	650-00	17326	195-120-21P	Possessory Interest	Residence #109 Pinehurst & site	88	-0-	45/M
Thomas Adams	650-00	17328	195-120-23P	Possessory Interest	Residence #103 Pinehurst & site	110	-0-	50/M
Jesse R. Luna	650-00	17325	195-120-20P	Possessory Interest	Residence #110 Pinehurst & site	88	-0-	45/M
Lawrence L. Cabodi	650-00	17330	195-120-25P	Possessory Interest	Residence #1135 Pinehurst & site	110	-0-	55/M
Harold F. Sebring Jr.	650-00	17327	195-120-22P	Possessory Interest	Residence #101 Pinehurst & site	176	-0-	85/M

DEFENDANT'S EXHIBIT F

COUNTY COUNSEL
INTER-OFFICE MEMORANDUM

[Received Jun. 7, 1967, Assessor]

To: Mr. G. B. Gard, Assessor

From: Max E. Robinson

Date: June 7, 1967

With reference to your inter office memo of May 18, 1967 regarding the question of possessory interest as to certain employee housing of the Panoche Water District, we have read *McCaslin* v. *DeCamp*, 248 A.C.A. 16 on this subject. In the McCaslin case the court found that there was a possessory interest arising out of the month to month tenancy of the employee. The court distinguished the tenancy of the employee from a mere license. Said the court,

> "In other words, if the employee's right to the use and possession of the employer's real property is in common with other employees, or if it is subordinate to the right of possession of the employee, the employee's right is a mere permit or license which is not taxable. But, if his use and possession are exclusive to others, including the employer, and particularly when he is paying a rent therefor, it is a possessory interest under Revenue and Taxation Code 107, and the right of the employer to terminate the employment and hence the occupancy is only a factor to be considered in fixing its value . . ."

It is difficult to imagine in an employee housing situation that the employee would not have exclusive possession at least during the time he is paying rent. If you find, notwithstanding the wording of the document that has been given to you to which you refer in your above mentioned memo, that in fact the employee has the right

of exclusive possession during the time he pays rent, his interest is taxable under section 107 of the Revenue and Taxation Code.

ROBERT M. WASH
County Counsel

By /s/ Max E. Robinson
Deputy County Counsel

MER:ndc

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF TUOLUMNE

No. 11317

UNITED STATES OF AMERICA, IN ITS OWN BEHALF, ET AL.,
PLAINTIFFS

vs.

COUNTY OF TUOLUMNE, DEFENDANT

RELEVANT DOCKET ENTRIES

Feb. 21, 1968 Filing Complaint—Action to Recover Taxes
Issuing Summons
Filing Summons

Feb. 27, 1968 Filing Answer—(County of Tuolumne)

* * * *

Oct. 15, 1969 Filing Order Granting Defendant Leave to Amend Answer or Upon Failure to do so for Judgment on the Pleadings in Favor of Plaintiff
Filing Affidavit of Mailing

Oct. 23, 1969 Filing First Amended Answer

* * * *

Apr. 14, 1971 Filing Interrogatories to Defendants

* * * *

May 4, 1971 Filing Answers of Defendant to Interrogatories Propounded by Plaintiffs

* * * *

Jun. 1, 1971 Filing Notice of Pre-Trial Conference

Aug. 17, 1971 Filing Pre-Trial Statement of Defendant

Aug. 17, 1971 Filing Pre-Trial Statement of Plaintiff United States of America

Aug. 20, 1971 Filing Pre-Trial Conference Attorneys Appearances
Filing Judges Pre-Trial Conference Check Sheet (Order)
Filing Certificate of Mailing of Pre-Trial Conference Order

* * * *

Nov. 27, 1972 Filing Minute Order [on Trial]

Nov. 28, 1972 Filing Minute Order [on Trial]

* * * *

Apr. 2, 1973 Filing Memorandum of Opinion
Filing Notice of Intended Decision
Filing Affidavit of Mailing

Apr. 11, 1973 Filing Request for Findings of Fact and Conclusions of Law

* * * *

May 14, 1973 Filing Findings of Fact and Conclusions of Law
Filing Judgment
Filing Certificate of Mailing Notice of Entry of Judgment

Jul. 12, 1973 Filing Notice of Appeal and Notice to Prepare Clerk's and Reporter's Transcripts
Filing Certificate of Reporter Waiving Deposit
Filing of Affidavit of Mailing

Jul. 18, 1973 Filing Request for Inclusion of Exhibits in Record on Appeal to the Fifth Appellate Court

Sep. 17, 1973 Filing Request for Correction of Reporter's and Clerk's Transcript

Sep. 26, 1973 Filing Minute Order

Sep. 28, 1973 Mailed Clerk's and Reporter's Transcript on Appeal to Fifth Appellate Court

Apr. 8, 1975 Filing Affidavit of Mailing Plaintiff's Exhibits

Apr. 14, 1975 Filing Return Receipt on Exhibits from Fifth Appelate [sic] District

Oct. 15, 1975 Filing Remittitur from Fifth Appelate [sic] District

Jan. 6, 1976 Filing Notice of Appeal to United States Supreme Court

Jan. 6, 1976 Filing Notice of Appeal to United States Supreme Court

IN THE COURT OF APPEAL,
FIFTH APPELLATE DISTRICT
STATE OF CALIFORNIA

5 CIV 2124

[Caption Omitted]

See Also 2055

RELEVANT DOCKET ENTRIES

Oct. 1, 1973 Filed CT and RT on Appeal from J

* * * *

Oct. 24, 1973 Filed Request for Consolidation of the Appeals

Oct. 24, 1973 Pursuant to Request of Respondent etc., and Good Cause Appearing Therefor, it is Ordered that the two Above-Mentioned Causes be Consolidated on Appeal for Purposes of Briefing

* * * *

Apr. 11, 1975 Exhibits Lodged Pltf's 1-7

* * * *

May 14, 1975 Cause Argued and Submitted

* * * *

Aug. 13, 1975 Opinion: Reversed with Directions Gargno [sic], J. [NP] We Concur: Brown (Geo. A.), P. J. and Franson, J.

Sept. 22, 1975 Received Petition for Hearing in Supreme Court

Sept. 22, 1975 Original Record Shipped to Supreme Court

* * * *

Oct. 14, 1975 Filed Copy of Supreme Court Order Denying Hearing

Oct. 14, 1975 Remittitur to County Clerk

Dec. 27, 1975 Original Exhibits Return to County Clerk

Jan. 6, 1976 Filed notice of Appeal to US Supreme Court

[Attorneys' names omitted]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF TUOLUMNE

No. 11317

Filed February 21, 1968

UNITED STATES OF AMERICA, in its own behalf and on behalf of C. W. BATES, J. RUSK, JR., J. R. ALVIS, R. A. GILKEY, S. G. MAUK, T. W. RALLS, D. J. SCHROEDEL, R. C. HENSLEY, C. G. WESTRATE, M. H. HOLLOWAY, J. R. SEILS, and R. K. SEMMENS, each suing in his own behalf, PLAINTIFFS

v.

COUNTY OF TUOLUMNE, DEFENDANT

COMPLAINT

ACTION TO RECOVER TAXES

Plaintiffs by their attorney, John P. Hyland, United States Attorney for the Eastern District of California, allege that:

1. Plaintiff United States (hereinafter sometimes called Government) is a corporate sovereign and body politic.

2. At all times pertinent the individual plaintiffs herein were employed by the Government in the Forest Service of its Department of Agriculture and were assigned to duty stations in Tuolumne County in connection with the protection, maintenance and administration of the Stanislaus National Forest.

3. Defendant is a political subdivision and body politic of the State of California.

4. The Government brings this action, at the request of its Department of Agriculture and under the direction

of its Attorney General, in its own behalf and on behalf of the individual plaintiffs because of its interest as sovereign in vindicating its immunity under the Federal Constitution from state and local taxation and in protecting its employees from illegal assessments against them in contravention of rights derived from said immunity.

5. On the first Monday in March, 1967, and at all times pertinent thereafter, the Government owned in fee simple and was in actual possession of certain lands and dwellings in Tuolumne County which the Government, acting through its Forest Service, held, maintained and used as living quarters for its employees as provided by Congress in Title 5, United States Code, Section 5911.

6. On the aforesaid date, each of the individual plaintiffs had been assigned by the Government to, and was occupying, at the Government's pleasure, living quarters in such dwellings as an incident of, and in part compensation for, his employment.

7. Defendant's assessor, determining that each individual plaintiff had a possessory interest in the respective quarters occupied by him, assessed the purported possessory interests at the respective valuations and levied taxes against the individual plaintiffs in the respective amounts shown below:

	Assessed Value		
Name of Employee	Land	Improvements	Tax
BATES, C. W.	$120	$ 970	$78.37
RUSK, J., Jr.	120	1150	91.31
ALVIS, J. R.	120	410	38.11
GILKEY, R. A.	120	1010	81.25
MAUK, S. G.	120	1150	91.31
RALLS, T. W.	120	920	74.78
SCHROEDEL, D. J.	200	1040	86.06
HENSLEY, R. C.	200	750	65.93
WESTRATE, C. G.	200	1050	86.75
HOLLOWAY, M. H.	200	300	35.30
SEILS, J. R.	200	650	58.99
SEMMENS, R. K.	200	1050	17.35

8. Pursuant to instructions from the Government, the individual plaintiffs paid the aforesaid taxes on August 31, 1967, under written protest.

9. On September 14, 1967, the Government and the individual plaintiffs filed an application for cancellation or reduction of said assessments and for refund of said taxes paid. Said application was heard before defendant's Board of Equalization on November 14, 1967, and denied.

10. Said protest and application were made, and this action is brought, upon the grounds that said taxes were erroneously and illegally assessed because, among other reasons

(a) No tax is provided for under California law since none of the individual plaintiffs had a taxable possessory interest in the quarters occupied by him; and

(b) The provisions of California law, if and insofar as they provide for said taxes, violate the Constitution of the United States of America and the State of California because of infringement of the immunity of the United States from state and local taxation and infringement of the rights derived therefrom by the individual plaintiffs, each of whom occupied the quarters assigned to him as a servant of and in behalf of the United States; and

(c) Even if any of the individual plaintiffs had a taxable possessory interest, the assessment against him was excessive, erroneous and void:

(i) because it taxed a possessory interest different from the possessory interest which he had; and

(ii) because predicated on an excessive valuation of the possessory interest which, in fact, had no value.

11. This action is brought upon the further grounds that defendant's Board of Supervisors, sitting as the

Board of Equalization, arbitrarily disregarded the evidence adduced at the hearing, in refusing to cancel or reduce said assessments and order refunds as prayed by plaintiffs, and, therefore, acted erroneously, illegally and fraudulently.

WHEREFORE plaintiffs pray for judgment:

1. Canceling the assessments against the individual plaintiffs herein as illegal, void and of no effect; or
2. Reducing the assessments to valuations of zero in each instance, or to such valuations as the court determines to be equitable, should the court find that the individual plaintiffs have lawfully taxable possessory interests in the quarters which they occupy; and
3. Directing the refund, with interest as provided by law, of the taxes paid by plaintiffs, or such portion thereof as the court determines to have been improperly and illegally levied.

JOHN P. HYLAND
United States Attorney

By /s/ James J. Simonelli
JAMES J. SIMONELLI
Assistant United States Attorney
Attorney for Plaintiffs

VERIFICATION

Each of the undersigned declares under penalty of perjury that he has read the foregoing complaint and knows the contents thereof; that to his knowledge the same is true and correct and that this verification was subscribed by him within the State of California at the place and on the date hereinafter set forth opposite his signature:

JOHN P. HYLAND
United States Attorney

By /s/ James J. Simonelli
JAMES J. SIMONELLI
Assistant United States Attorney
Attorney for Plaintiffs

Place—Sacramento, Cal.

Date—19 Feb. 1968

Individual Plaintiffs

Place		Name
Groveland Calif		Curtis C. Bates
		C. W. BATES
2/19/68		c/o U.S. Forest Service
Date		Groveland, Calif
		Address
Groveland Calif		John Rusk, Jr.
Place		J. RUSK, JR.
2/19/68		c/o U.S.F.S.
Date		Groveland Calif
		Address
Groveland, Calif		James R. Alvis
Place		J. R. ALVIS
2/19/68		c/o USFS
Date		Groveland, Calif
		Address
Groveland, Calif.		Robert A. Gilley
Place		R. A. GILLEY
2/19/68		c/o U.S. Forest Service
Date		Groveland, Calif.
		Address
Groveland, Calif		Samuel G. Mauk
Place		S. G. MAUK
2-19-68		% U.S. Forest Service
Date		Groveland, Calif
		Address
GROVELAND, CALIF		Thomas N. Sells
Place		T. N. SELLS
2-19-68		% U.S. FOREST SERVICE
Date		GROVELAND, CALIF
		Address

Place		Name
PINECREST, CALIF.		David A. Schroedel
		D. J. SCHROEDEL
2/19/68		STAR RT. Box 1295
Date		SONORA, CALIF.
		Address
PINECREST, CALIF		Robert C. Hensley
Place		R. C. HENSLEY
2/19/68		STAR RT Box 1295 SONORA, CALIF
Date		Address
Pinecrest, Ca		Carl G. Nielsen
Place		C. G. NIELSEN
Feb. 19, 1968		Lisa A. Burnes Sonora, Ca
Date		Address
Pinecrest, Cal		Michael D. Mahoney
Place		M. D. MAHONEY
Feb 19, 1968		Star Route Box 1295, Sonora Ca
Date		Address
Pinecrest Calif		Jas. R. Seils
Place		J. R. SEILS
Feb 19, 1968		STAR ROUTE BOX 1295 SONORA
Date		Address CALIF
Pinecrest, Calif		Robert K. Simmons
Place		R. K. SIMMONS
Feb 19, 1968		Star Route Box 1295 Sonora
Date		Address Calif

[Attorneys' names omitted]

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF TUOLUMNE

No. 11317

Filed October 23, 1969

[Caption Omitted]

FIRST AMENDED ANSWER

Answering Plaintiff's complaint on file herein, Defendant admits, denies and alleges as follows:

I

Defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 7, 8 and 9 of Plaintiff's complaint.

II

In answer to the allegations contained in paragraph 5 of Plaintiff's complaint, Defendant admits that on the first Monday of March, 1967, and at all times pertinent thereafter, the Government owned in fee simple certain lands and dwellings in Tuolumne County which the Government, acting through its Forest Service, used as living quarters for its employees; Defendant denies that, during the times aforementioned, the Government was in actual possession of said lands and dwellings.

III

In answer to the allegations contained in paragraph 6 of Plaintiff's complaint, Defendant admits that, during the times aforementioned, each of the individual plaintiffs had been assigned by the Government to, and was occupying living quarters in such dwellings as an incident of his employment; Defendant denies that, during

the times aforementioned, such occupancy was at the pleasure of the Government.

IV

In further answer to the allegations contained in paragraph 6 of Plaintiff's complaint, Defendant has no information or belief sufficient to enable him to answer the allegation that the aforesaid occupancies were in part compensation for the employment of the individual plaintiffs, and upon this ground denies said allegation.

V

Further answering Plaintiff's complaint, Defendant alleges that, at all times herein mentioned, each individual plaintiff was in actual and exclusive possession of the Government-owned dwelling which he occupied, that he paid a monthly rental therefor, and that the amount of this monthly rental was appreciably less than rents paid by other persons for privately owned similar facilities in the same area of Tuolumne County.

VI

Paragraphs 10 and 11 of Plaintiffs' complaint contain no allegations of fact which Defendant may admit or deny.

WHEREFORE, Defendant prays that Plaintiffs take nothing by their action herein.

Dated October 23, 1969

ERNEST GEDDES
District Attorney, County of Tuolumne

By: /s/ Thomas M. Marovich
Thomas M. Marovich
Attorneys for Defendant

SUPERIOR COURT OF CALIFORNIA
COUNTY OF TUOLUMNE

[Caption omitted]

REPORTER'S TRANSCRIPT ON APPEAL

November 27 & 28, 1972

HONORABLE ROSS A. CARKEET, JUDGE

COUNSEL:

For Plaintiff;

RICHARD W. NICHOLS
Assistant United States Atty.
2112 Federal Building
650 Capitol Mall
Sacramento, California 95814

For Defendant;

STEPHEN DIETRICH, JR.
County Counsel
41 West Yaney Avenue
Sonora, California 95370

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* * * *

[2] [Colloquy between Court and Counsel]

THE COURT: Take up this case of United States and others versus the County of Tuolumne. Are you ready, Counsel?

MR. NICHOLS: Ready for the Government, Your Honor.

MR. DIETRICH: Ready for the County, Your Honor.

THE COURT: May we have the appearances for the Government?

MR. NICHOLS: Yes, Your Honor. My name is Richard W. Nichols, Assistant U.S. Attorney, appearing on behalf of the Plaintiffs. All right.

THE COURT: Mr. Dietrich?

MR. DIETRICH: Steven Dietrich, Jr., County Counsel, County of Tuolumne, appearing on behalf of the Defendant.

THE COURT: All right. In this matter, the Court has had an opportunity to review the file and read the trial briefs prepared and the trial memorandum of the Plaintiff and the supplemental trial memorandum and the trial memorandum of the—memorandum of the—pre-trial memorandum of the Defendant. I would like to see if we can establish for our—before we begin here for the record, the matters agreed upon so we can get down to the nub of the issue. I believe in the pre-trial conference Order, we recited matters agreed upon, did we not?

MR. DIETRICH: Yes, Your Honor.

MR. NICHOLS: That's correct.

THE COURT: I don't think I conducted that pre-trial.

MR. NICHOLS: No, that was Judge Moore from Riverside, [3] I believe.

THE COURT: It is in the form of a check sheet and—yes, there's a list of matters agreed upon in the pre-trial Order. Number one Plaintiff, United States, is a corporate sovereign body politic. Two,—well, let me ask you, Counsel, there are nine matters that are agreed upon. Is there any questions or corrections to any of those?

MR. NICHOLS: No, Your Honor.

MR. DIETRICH: All right. And then, he states on page one of the pre-trial Order, that the following issues remain in dispute:

Paragraph 5, A, whether individual Plaintiff's interests are taxable possessory interests as defined in Revenue and Taxation Code 107. B, if taxable possessory interests under that Section, is this in violation of the Doctrine of Sovereign Immunity as made applicable by the Supremacy Clause of the United States Constitution. And C, if taxable possessory interests, is the Assessor's valuation excessive, arbitrary or discriminatory.

That seems to be the three, is that the way you see it, Counsel?

MR. NICHOLS: That's correct, your Honor. I would, however, like to expand B there a little bit. That's the Sovereign Immunity Supremacy Clause argument, because as set forth there, it relates only to the Supremacy Clause of the U.S. Constitution. I would wish to include within that concept the Supremacy Provisions of the State Constitution, [4] the Act of Admission of the State of California, and the prohibition of the State Revenue and Taxation Code against double taxation.

THE COURT: Let's see. The Supremacy Clause of the State Constitution, the Act of Admission?

MR. NICHOLS: The Act of Admission of the State of California.

THE COURT: Of the State of California. And?

MR. NICHOLS: The prohibition of the Revenue and Taxation Code against double taxation.

THE COURT: All right.

MR. NICHOLS: And the prohibition against discrimination against the United States of America in taxation, which would include within its scope the provisions of title 16, U.S. Code Section 500, having to do with in lieu taxes. And the provisions of California Public Resources Code Section 4654 having to do with exemption of State forests from possessory interest taxation.

I think generically, those all fall within the Supremacy Clause, but I wanted to be sure that they were all specifically included as issues.

THE COURT: Any objection to that?

MR. DIETRICH: No, Your Honor, I concur that they really generically do follow in the Supremacy Clause. No objection.

• • • •

[11] MR. NICHOLS: Yes, Your Honor, before I call any witnesses, I would ask that the Court take judicial notice of the provisions of title Seven of the Code of Federal Regulations, Section 0.735—11.

THE COURT: 0.735—11.

[12] MR. NICHOLS: Subdivision (b) and subdivision (p).

THE COURT: (p)?

MR. NICHOLS: P as in Peter.

THE COURT: All right.

MR. NICHOLS: And I will hand a copy of that document to the Court.

THE COURT: The Court will take judicial notice of the documents. Possibly, just to keep it in order, it might be well to mark this as an Exhibit. Do you have any objection to that?

MR. DIETRICH: No, Your Honor.

MR. NICHOLS: It's agreeable.

THE COURT: Plaintiff's Exhibit 1, Code of Federal Regulations.

(WHEREAS, Code of Federal Regulations was thereupon marked as Plaintiff's Exhibit No. 1 for identification.)

MR. NICHOLS: I'll ask Your Honor, that there be introduced as the Government's next in order a certified copy of the findings of the Tuolumne County Board of Supervisors sitting as a Board of Equalization, Findings of Fact, Conclusions of Law and the decision, among which is the finding of fact number seven, that the assessor used an estimated term of occupancy of five years in determining the value of the possessory interests.

THE COURT: Any objection?

MR. DIETRICH: No objection, Your Honor.

THE COURT: Exhibit 2 in evidence.

[13] (WHEREAS, Certified copy of Minutes at the Board of Equalization was thereupon marked as Plaintiff's Exhibit No. 2 for identification and thereupon received in evidence.)

MR. NICHOLS: Then, at this time, I'll call Mr. Harold L. Mitchell.

HAROLD L. MITCHELL, called as a witness on behalf of the Plaintiff, having been regularly and duly sworn, assumed the stand and testified as follows:

MR. NICHOLS: Before I inquire of Mr. Mitchell, Your Honor, as Mr. Dietrich indicated, it was stipulated that the Forest Service manual, the R-five Western Regional Supplement, and the Bureau of the Budget circular, A45 be admitted into evidence, these documents were attached to answers to interrogatories—no, I take it back. Attached to my motion for summary judgment that I made.

THE COURT: Yes.

MR. NICHOLS: Previously.

THE COURT: Would you repeat those documents again?

MR. NICHOLS: Yes, Your Honor. They are the Forest Service Manual provisions of Section 6445 having to do with quarters rental. And that document appears as Exhibit A to the affidavit of Helen M. Waters, which was attached to my motion for summary judgment.

THE COURT: All right. That document, Exhibit A, attached to the affidavit of Helen M. Waters will be marked [14] as Plaintiff's Exhibit 3 in evidence, for the purpose of this trial.

(WHEREAS, Exhibit A attached to the affidavit of Helen M. Waters was thereupon marked as Plaintiff's Exhibit No. 3 for identification, and thereupon received in evidence.)

MR. NICHOLS: Also, Your Honor, the R-five Western Regional Supplement, and I'll Mr. Mitchell give some foundational testimony concerning this, that was attached as Exhibit B to the Helen Waters affidavit.

THE COURT: That document, R-five Western Regional Supplement will be marked and received in evidence as Petitioner's Exhibit—as Plaintiff's Exhibit 4 for the purposes of this trial.

(WHEREAS, R-five Western Regional Supplement was thereupon marked as Plaintiff's Exhibit No. 4 for identification and thereupon received in evidence.)

MR. NICHOLS: And finally, Bureau of the Budget —Bureau of the Budget circular number A-45, which was attached as Exhibit C to the Helen Waters affidavit.

THE COURT: That document will be received in evidence for the purposes of this trial as Plaintiff's Exhibit 5.

(WHEREAS, Bureau of the Budget circular No. A-45 was thereupon marked as Plaintiff's Exhibit No. 5 for identification and thereupon received in evidence.)

[15] DIRECT EXAMINATION

BY MR. NICHOLS:

Q All right. Mr. Mitchell, will you state your full name please?

A Harold Lloyd Mitchell.

Q And by whom are you employed?

A United States Forest Service.

Q In what capacity?

A At the present time?

Q At the present time.

A Deputy Forest Supervisor on the San Bernardino National Forest.

Q All right. During the year 1967, by whom were you employed?

A United States Forest Service.

Q And in what capacity?

A As Branch Chief in the Division of Operation in charge of work planning and workload analysis.

Q And what were the duties and functions of that position?

A Well, part of the responsibility with respect to the issue in question was the administration of the regions rental program, quarters rental program, I should say.

Q And in conection [sic] with the administration of that program, did you have any duties or criteria that you acted under?

A Yes. We have two basic ones. Number one, the Bureau of the Budget Circular, A45, which not only applies to the Forest Service, but to all Federal Agencies. And the Forest [16] Service Manual, comes directly from our Washington Office.

Q All right. What area were you responsible for in your position? Geographical area?

A Well, basically, the State of California, which we referred to as Region Five.

Q All right. Did you prepare or was there prepared under your supervision any supplemental guide lines to supplement the Forest Service Manual and the Bureau of the Budget Circular?

A Yes. I authorized the Region Five supplement to the Forest Service Manual 6445.

Q And is it fair to say that these three documents, the Forest Service Manual, the Western Regional Supplement and the Bureau of the Budget Circular A45 where the handbook for determination of the administration of quarters rental matters in the California region?

A Yes.

Q Of those three documents, the R-5 Western Regional Supplement that you authorized, applied only in the California Region?

A That's correct.

Q And the other documents applied nation-wide for the Forest Service?

A Yes.

Q Was there any distinction in application in any of these three documents as between different national forests within the State of California?

A I'm not sure I understand what you mean by "distinction". [17] Do you mean that were the policies that were cited in the supplement for this region applicable to all national forests within the region?

Q That's what I'm asking you.

A Yes.

Q All right. Would you tell the Court what the line organization of the Forest Service is, first, concerning persons in the field, and then, concerning the relationship of the persons in the field to the office that you occupied in 1967?

A Do you want an organizational sketch of how we're structured?

Q That's right.

A Well, let me reverse, if I can start at the top. The service wide, the Forest Service, is headed up by a line officer called the Chief. This Country is divided into geographic units called regions, and there are nine. Each region is administered by a regional forester who, again, is a line officer. Within the region, it's divided geographically into national forests. Each national forest is headed up by a line officer called the Forest Supervisor. In turn, each national forest is divided into geographic administrative units called range or district, each of which is headed by a line officer called the District Ranger.

Q All right. So, in terms of the instant case where we're talking about 12 individuals in the Stanislaus National Forest, there would have been a forest—one Forest Supervisor?

[18] A Yes.

Q And a number of District Rangers, according to however many districts there were in the Stanislaus Forest?

A Correct.

Q All right. What was your individual relationship to either the regional forester or the Stanislaus Forest Supervisor?

A Well, I had no line authority over any of the supervisors within region five. My basic responsibility was acting in the capacity, in a staff capacity, for the Regional Forester in interpreting and authorizing Region Five policy, which, in turn, was sent out to the National Forest for administration of the quarters rental program.

I had no direct relationship with the—any single District Ranger, other than in an inspection capacity.

Q Your relationship with the Forest Supervisors would be through the Regional Forester?

A That's correct.

Q What were the—in general terms, what were the duties of the Forest Supervisor?

A Well, the Supervisor is responsible for the administration of all of the resources, uses and activities that occur on National Forest lands within his administrative unit, the National Forest.

Q In other words, he is the Chief of the Forest, so to speak?

A For that forest, that's right.

Q For that particular forest?

[19] A Yes.

Q And what would the functions—what would be the functions of the District Rangers acting underneath the Forest Supervisor?

A Virtually identical to that of the Supervisor except on a smaller unit, which is the range or district.

Q All right. Did you make or was there made under your direction and supervision and study concerning the occupancy of Forest Service quarters and the rent to be paid for such quarters?

A Yes.

Q And what was the nature of this study?

A Well, I should cite one reference, first, which is a mandatory requirement by the Bureau of the Budget, again applicable to all Federal Agencies. It says that all rental rates must be reviewed and/or adjusted not less than every three years. So, this is—this is done every three years as a minimum. The basis for establishing the base rental rates, we use in the Forest Service, is based upon compatibility that is comparable with private housing of the same general size, design, et cetera. The private rental samples were actually made by the 17 National Forests in this region. And the sample areas were determined by the statistical analysis procedure developed by our experiment station in Berkeley. In other words, not every community was sampled, trying to pick out representative types of houses or dwellings which were comparable to Forest Service dwellings. The

rates for those were—average rental rates were com-
[20] puted for each class, and then, these were used as a basis for determining the base rental rates for the Forest Service Headquarters.

Q Okay. You're getting into several things here. First, do you know offhand what communities were used as the sample communities in the Stanislaus National Forest area?

A I don't recall specifically, but it seems to me there's a—they're outlined in the Region Five supplement. But Sonora, Angels Camp and Altaville as a combination. I could refresh my memory, if you want.

Q All right. I'll refer you to Section 6445.43-3, and ask you to review that and tell us what the sample communities were?

A Angels Camp-Altaville, combination of the two, and Sonora.

Q All right. Now, you made reference to classifications of the facilities that you sampled. Would you tell us what the nature of these classifications were?

A I could best respond to that by giving you specific examples. Starting at the top, we have three classes of residences or dwellings. Class A resident has three bedrooms. A Class B has a—essentially the same facilities as a Class A, but with only two bedrooms. And a Class C has essentially the same as a Class A except it has one bedroom. And in addition to that, we have barracks-type facilities and house tralers [sic], and sometimes tents, which we don't charge for.

Q And I take it different rental rates would be applicable to different class facilities?

[21] A Yes.

Q Would there be any adjustments made for any given individual facilities from the general class rate?

A Adjustment because of location or amenities?

Q Well, adjustments for any reason? You tell me what they would be and why?

A Well, there are specific adjustments permitted, again by the basic document, which is Circular A45, that permits and adjustment and a rental rate depending upon the distance. The dwellings are located from

what the Bureau of the Budget describes as an established community. The further away the residence is located, the greater the adjustment. There's also an adjustment for what the Bureau of the Budget describes as amenities, and they list 15 of these. This is a lesser type of adjustment, but it is permissible and it's based again upon comparable amenities that are determined in a private rental survey sample.

THE COURT: Would you give me an example of two or three of these amenities?

THE WITNESS: Yes, Your Honor. Police—adequate Police protection, adequate fire protection, schools or free buses to schools, adequate shopping facilities,—

THE COURT: All right. Thank you.

MR. NICHOLS: Q Mr. Mitchell, I'll have you refer to paragraph five F of the Bureau of the Budget Circular A45 having to do with the full list of amenities and ask you to tell the Judge the entire amenities listed?

A All 15?

[22] Q Yes, please.

A Paved streets, street lighting, at least at intersections, sidewalks, lawns, trees and landscaping, general attractiveness of the neighborhood, community sanitation services, reliability and adequacy of water, safe for household use, reliability and adequacy of electrical service, reliability and adequacy of telephone service, reliability and adequacy of fuel for heating hot water and cooking, Police protection, fire protection, unusual design features of the dwelling, absence of disturbing noise or offensive odors and standard of maintenance.

Q Is there a basic underlying requirement that must be met before any assignment is made to Forest Service residence quarters?

A I'm not sure I completely understand that question.

Q I'll specifically refer you to the Forest Service manual Section 6445.03-3.

A Do you want me to just read from this?

Q Yes.

A Occupancy of Government owned residences will ordinarily be limited to the following categories of em-

ployees: short-term employees, such as fire control or recreation aids.

Q All right. Mr. Mitchell, I think I may have pointed to the wrong area. 6445.3—

A Oh.

Q —.03.

A Oh, you're talking about required occupancy?

Q Right.

[23] A Okay. Well, basically, there are three—there are only three conditions under which a Supervisor can require an employee to live in a Government dwelling. These simply are, one, to provide service to the public; examples are recreation aids at heavily used remote recreation areas, and scalers needed to scale or control movement of logs hauled from National Forests Timber Sales.

Number two, to protect the natural resources; examples are fire lookouts, fire foreman, suppression crews or other fire control personal who either need to be immediately available or for fire suppression duties or who are stationed at specific locations, according to an improved fire plan.

And a third condition is to operate necessary or special licenses equipment; and example is certain employees at nursery or research installations.

Q And is it correct that there can not be a requirement of occupancy unless the agency determines that these necessary services that you've discussed, cannot be rendered or that property of the Government cannot otherwise be adequately protected?

A That's right.

Q Who makes—strike that. Are there any written documents or agreements or contracts in existence between the individual Forest Service employee and the Forest Service with reference to his occupancy of a given dwelling?

A No.

Q How does a Forest Service employee start occupying a [24] given dwelling?

A Normally, they're assigned by the District Ranger. I'm talking about the headquarters locations; for example, District Ranger's headquarters that may have one or more Government dwellings on that particular site. And the District Ranger determines who occupies those with the exception of the one that's reserved for himself, and the Supervisor makes that decision.

Q Does the individual employee have any say-so in any choice of what dwelling he shall occupy?

A No, basically not. He can state is preference, but the decision is that of the District Ranger.

Q All right. How is the rent paid by the individual employee?

A It's paid through bi-weekly deductions from their payroll. In other words, the employee never sees that money. He does—there's no money that's transacted between the employee and the employer. It's simply a deduction made every two weeks from his payroll.

Q And the employee has no negotiating power over what the amount of the rent will be?

A Oh, no. Neither does the Forest Supervisor, for that matter. After those basic rental rates are established by the Regional Forester, there is no authority to change those.

Q All right. The money that is withdrawn from the—from the pay check on the bi-weekly basis, is that withdrawal for the period immediately preceding the date of the check or the period of—for the period immediately succeeding the [25] date of the check?

A It's for the period preceding payment of the check.

Q In the event that an individual employee does not occupy his assigned quarters for a portion of the preceding two weeks, does he pay the entire two week—strike that.

Is the entire two-week withdrawal taken from his check or is there a proration?

A No. It's a standard pay period deduction. There is no—it's not prorated based upon the number of days he actually lives in the dwelling assigned to him.

Q Well, what if he is removed from dwelling A to go on temporary duty, let's say, in another national forest, and another family moved into dwelling A, would

he pay the entire two-week period, even though the other family actually occupied dwelling A?

A No, he would not. In that situation, he would only pay the computed daily rate for the actual number of days that he or his family occupied that dwelling.

Q Is there any standard on the basis of which a particular employe is assigned to a particular quarter?

A Well, I guess, if I understand your question, I might say there are several that administratively are used. In most situations, where we have dwellings at the headquarters location of a District Ranger, one of the residences is reserved for the District Ranger himself. Now, if he chooses not to live there, but lives somewhere else, that's his prerogative, providing the Supervisor will agree to let somebody else live in that dwelling. The only other situation that comes to mind, is in the case where we have, as an example, a [26] bachelor living in a two-bedroom residence, and a family moves in or comes to the district there, a married couple with children, that individual can be required to move out of those premises there in order to make it available to the family. Is that what you're getting at?

Q Even though he still retains his employment in that particular area, the same job in the same work area?

A Oh, yeah, that's right. There's no distinction made there. If there are quarters available for him to move into, using this example again, and by him, I mean the bachelor, when he moves out of the two-bedroom residence, these are assigned to him. If there are no quarters, then, he has to find private housing of his own.

Q Is this, in essence, simply making a most efficient use principle?

A Yes, exactly.

Q Does the individual employee have any legal recourse against the Forest Supervisor or District Ranger who moves him out of a given facility?

A He has no legal recourse, none whatsoever. The only recourse he has would be to request an audience with the Supervisor and appeal the District Ranger's

decision. But that's an administrative recourse, not a legal one.

Q All right. And are there any standards in connection with this administrative recourse, or is this a discretionary matter on the part of the Ranger and the Supervisor?

A It's a discretionary matter.

THE COURT: You mean, the ultimate decision is a discre- [27] tionary matter?

THE WITNESS: Yes, Your Honor.

THE COURT: From the Supervisor? All right. We might at this time, Mr. Nichols, take the morning recess, if you're looking for something.

MR. NICHOLS: Thank, Your Honor.

THE COURT: There's some hot coffee in the Jury-room, all of you gentlemen, compliments of the Court. And we'll take a ten minute recess.

MR. NICHOLS: That you, Your Honor.

(WHEREAS, Recess was taken at 11:00 a.m. and Court reconvened at 11:15 a.m.)

THE COURT: You may contine [sic].

MR. NICHOLS: Q Mr. Mitchell, does the Forest Service make a distinction between occupancy on a landlord-tenant basis and occupancy on an employee-employer basis?

A No.

Q Well, let me refer you to Section 6445.05-3 of the manual. Now, would you first—would you read that provision to the Court?

A The Section title "Private Housing?"

Q Right.

A This is housing rented on a landlord-tenant basis, with rental rates reflecting a fair market value of the accomodations to their tenant. This is distinguished from housing rented on an employer-employee basis, for which other considerations may have influenced rental rates; thus, such housing as other Government-owned housing, housing provided [28] by churches or religious societies, caretakers, housing are excluded from this definition

from private housing and should not be used in rental rates surveys.

Q All right. Now, that provision is used in connection with the setting of the rental rate for the Government quarters, is that correct?

A Yes.

Q And it does make a distinction between landlord-tenant rentals and employee-employer rentals for that purpose?

A Yes. I guess I didn't finish when I said no. What I meant to say was, no, we could not consider our rental relationship as a landlord-tenant relationship. We consider it as an employer-employee relationship.

Q All right. Now, let me ask you to refer to the R-five Western Regional Supplement Section 6445.23-282, having to do with exclusive versus nonexclusive use. First, would you read that provision to the Court?

A The questions of exclusive versus nonexclusive use must be considered in establishing dwelling classes and rates. Nonexclusive use permits moving other personnel into a building without approval of the employee or employees already living there. Exclusive use does not permit this.

Q All right. Now, first, is this provision part of that of the supplement that you authorized?

A Yes.

Q All right. Would you explain to the Court what that means, then, in terms of—of the rights of occupant employees?

A I could probably best explain it by citing an example. [29] Let's take a situation where we have a bachelor, a single man, living in a dwelling that's being occupied, either by himself or in connection with others. The District Ranger can assign other individuals in that particular dwelling if it's classified as a barracks. And the employee has no—no recourse there. Is that what you're getting at?

Q Uh-hmm. Does the District Ranger or the Forest Supervisor have the power to assign a new employee into quarters that are being occupied by a husband and wife, for example? Let's say, for example, a husband

and wife are occupying a two or three-bedroom facility. Does the District Ranger have the power to assign a third person to live in that same facility?

A It all comes back to his basic authority, and I guess I'd have to say yes, he has the authority to do that.

Q As a matter of morale and personnel—keeping the personnel happy, they, as a matter of practice, generally do not do this, is that correct?

A That's right. Rarely, if ever, is that done. It's more to respect the privacy of the family itself.

Q But they do have the power to do it?

A They have the authority to do it.

Q All right. Does an employee, who has been assigned to a specified facility, have the right to exclude the District Ranger or the Forest Supervisor from those quarters?

A No.

Q Can the Forest Supervisor or District Ranger enter those quarters for any reason or is he limited soley to entry for [30] inspection purposes?

A No. He is—the District Ranger or the Supervisor is unconstrained in that respect. He can enter a private dwelling there for any reason. Again, I guess, I should expand on that a little bit, Dick, and say it is a matter of common courtesy. It's normally not done. It's usually made in advance, arrangements with the family that's living there. But if—if there is something of an illegal nature, for example, the Supervisor or the District Ranger suspect is going on in a residence, he does not have to request permission to enter.

Q When you say something of an illegal nature, how broad do you mean that? For example, provision of the Code of Federal Regulations prohibits the use of these facilities for any but officially approved purposes. Now, is that—do you mean to go that far when you say "illegal purposes"?

A No. No. I guess—I'm just trying to think of an example. This is not one in reality, but if the District Ranger suspected there were narcotics, for example, being used by the occupants of that dwelling, he would not have to seek their permission to enter.

Q All right. I suppose the same thing would be true with the consumption of alcoholic beverages under the—

A No, I think that might be stretching it a little far.

Q All right.

A May be another example that might be a little more realistic, would be one where the District Ranger or the Supervisors suspects that the residence is being mistreated, being torn [31] up or just misused or abused, the employee of a Government dwelling has a basic responsibility to take care of that dwelling in a reasonable manner.

Q The District Ranger or Forest Supervisor has the authority, I take it, to move a given employee from one quarters to another and remove him from any given quarters at any given time, is that correct?

A Yes.

Q And is there any notice requirement in this connection?

A Any what kind of requirement?

Q Notice. Does this Ranger have to give the employee three days or five days or seven days notice that he's going to be moved out?

A No, there's no basic requirement. It can be done over night. In fact, it has been in some cases. Normally, again, as a matter of common courtesy, you let the employee know as far in advance as you possibly can. Sometimes, there's situations where that's not possible.

Q Does the Forest Service have residence facilities other than cabins or buildings of that nature to which it assigns personnel for residence purposes?

A Yes. In some locations, the—we actually lease buildings; that is, dwellings for our people.

Q Do you assign individuals to trailers, house trailers?

A Oh, yes.

Q Is that a frequent or infrequent occurrence?

A It's fairly frequent. It depends, again, upon—on the Forest and the location of the work. And I guess I should [32] add, the availability of private housing. So, many of our stations are so remote, there is no private

housing available in the immediate commuting distance, for example.

Q Does—what happens to a given employee and his occupancy of a given facility in the event of an emergency such as, for example, a fire?

A Do you mean if his dwelling is needed for—for administrative purposes in controlling the fire?

Q Right. Right.

A Well, here again, the District Ranger has the authority to temporarily move that employee or him and his family out of their quarters if that quarters is needed for administrative purposes during the emergency. But again, it happens infrequently. It has happened.

Q Does the employee have any right on his own to make modifications to the quarters?

A No, he does not.

Q What is the procedure involved in the event he wants to make modifications or improvements?

A Well, by modifications, I'm assuming you mean redo the interior, redecorate or add another bedroom?

Q Right.

A Well, he first has to—to submit his proposal to his superior, in this particular case, the District Ranger. And that has to be approved by the District Ranger and it has to be funded on a planned basis. And the work has to be done by qualified craftsmen, carpenters, painters, plumbers, or whatever.

[33] Q What if the employee wants—is a handyman and wants to do it himself?

A Well, if it's approved by the District Ranger and he has the necessary skills to make the modifications and he wants to do it on his own, that's permissible. But it—again, it has to be approved in advance.

Q What happens if the improvements are made by the employee and, for example, the adding of a bedroom, so that they change the classification of the facility, what happens with regard to the rent that's paid for that facility?

A Well, the rent is adjusted upward accordingly.

Q Even though the sole basis the improvements made by the employee himself?

A There's no distinction. It doesn't make any difference. He could have purchased all the materials, did all the labor and the whole job himself, if he had another—added another bedroom, the rental rate is automatically adjusted upward.

Q Does the employee have any right to sublease his quarters to another employee in the event that he's on temporary duty somewhere else or absent for some reason?

A No.

Q Is there a standard key which fits these quarters?

A Yes. A—it's a standard Forest Service lock and key that fits all Government quarters, and including warehouses, barracks, dwellings, offices, any of the structures we have. We are even required to have a standard Forest Service lock on leased offices, on at least one door.

Q Who has access to the standard key?

[34] A Well, virtually every employee of the Forest Service is issued a key, even many of our—in fact, I guess I'd have to say most of our seasonal employees are issued standard Forest Service keys when they report for duty. They're considered property. They must be returned when they leave.

Q Are these keys—do these keys ever come into the possession of non-Forest Service employees?

A Unfortunately, occasionally they do.

Q Well, for example,—

A In fact, it is uncommon at all—or I shouldn't say it that way. Occasionally, we'll have an employee that maybe isn't the most honest person in the world, and he can go down to any locksmith and have that key duplicated. And just—

Q Well, aside from any malfeasance of the employees, is there any policy with regard to—in private companies or individuals contracting with the Forest Service for given concessions or things of that sort,—

A Oh, yes. If one of our contractors needs access to a locked gate, for example, we'll issue him a key. Again, it's considered as property and he must turn it in when he completes the job or when the need no longer exists.

Q And the key that would fit a gate would be a standard key, and a standard lock that would also fit these quarters?

A That's right.

Q Are there any items, communications items, located in these quarters?

A Yes.

[35] Q And what are those items?

A Well, basically, they amount to either and/or radio and telephone communications. I'm not talking about commercial telephone, per se, no, but our own telephones system which is being gradually phased out and replaced by radio communications. But, I guess our most frequent type of communications we now have in some of our residences, is radio communications.

Q And to—are those radios available for use only by the individual who occupies the quarters, or are they available for use by others, either other employees or other individuals?

A They're available for use by anyone authorized to use our frequency. The intent is to put that particular individual living in that quarters in 24-hour communications. But it's not restricted to his exclusive use. The District Ranger could go in there or anybody can to use that radio that's a Forest Service Officer.

Q Is this radio something that can be shut off in the middle of the night or is it on 24 hours a day?

A Well, it can be shut off, but normally, the occupant that has the radio is required to have it on for 24 hours a day because it's there by design to put him in 24-hour communications. If he turns it off, obviously, he isn't in communications.

MR. NICHOLS: Can I have a moment, Your Honor, please?

THE COURT: Yes.

[36] MR. NICHOLS: I have nothing further of Mr. Mitchell.

THE COURT: Mr. Dietrich?

MR. DIETRICH: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. DIETRICH:

Q Mr. Mitchell, are you familiar with any of the 12 individual dwellings that are involved in this case?

A Yes, I am.

Q Have you—how many—have you gone out to them and physically seen them?

A Yes.

Q All 12 of them?

A Yes. Maybe I should clarify that, not in the capacity of being a staff assistant to the Regional Forester, but at one time, I was the Fire Control Officer on this Forest, and had occasion to visit every Ranger Station, every dwelling, not only on an inspection, but on the infrequent basis here.

Q Were you Fire Control Officer for the Stanislaus Forest?

A Yes.

Q Did you actually, you yourself, live in any of these quarters?

A No, I did not.

Q You've been testifying about rules and regulations under which these dwellings are occupied. As I understand it, these apply to the entire region five, which is California?

A That's right.

[37] Q And of course, then, apply to each dwelling where we have involved here these general rules and regulations?

A Yes.

Q You've indicated in the rules and regulations that employees can be moved out almost instantaneously, should the Supervisor require that under your rules and regulations, is that correct?

A I'm not sure that it's—that I understand your question completely. Whether it's—if I do understand it, it's stated that specifically in the regulations. But it is fairly—fairly clear and understood that the Supervisor or the District Ranger has the authority to move

—to assign a quarters and to move people as needed there.

Q In answering that question before, Mr. Nichols asked it, you've indicated that this was the case, the Supervisor could move them, but that—

A Yes.

Q —it was the poiicy of the Government not to move anyone unless you gave them as much notice as possible, is that correct?

A Well, rather than saying it's the policy, it's more or less the established procedure. It's a matter of courtesy to the family or to the individual himself attempting to giving him as much advance notice as possible.

Q Is this in the regulations somewhere, or is it just a matter of custom that you try to give them as much notice as possible?

A Oh, I don't think it's—it's cited anywhere in the [38] regulations.

Q Talking about the standard Forest Service lock and key, am I right in assuming that the key for the Forest Service headquarters here for Stanislaus National Forest is the same as you would find in one of these dwellings, the same key as somebody living in that dwelling has, would fit in the office here?

A Yes.

Q They're all the same—exact same key?

A Unless they've changed doors since I was here.

Q Can an individual occupying a Government dwelling put on his own lock?

A No, he cannot.

Q Do you know if they do on their own?

A I know of situations where an employee who is away for extended periods; and example would be, a Fire Control Officer may be out for a week or two at a time because of the protection of his—and the security of his family, he's put one of these bolt-type locks on the inside of the doors there. But normally, that has to be approved by the District Ranger before that's permitted. You see, he does not have the authority just to do that on his own.

Q But you seem to indicate some people just go ahead and do it?

A Yeah. Yes.

Q You mentioned communications equipment in the various facilities. Are there any radios or radio-type telephones I guess you'd call them, or communications equipment in any [39] one of these 12 dwellings?

A I don't—I don't know the situation at this point in time, Mr. Dietrich. But when I was Fire Control Officer here, the District Fire Control Officer on the Groveland District, which is one of the dwellings in question here, had a remote radio control in his dwelling and so did the one on the Summit Ranger District at Pinecrest.

Q Now, is that because he was—the Fire Control Officer was in that dwelling?

A Yes.

Q Do you put these kinds of radios in other Government dwellings, just in certain classes, like dwelling for a Fire Control Officer, or does every one of these things have a radio in it?

A Well, let me answer your last question first. No, not every residence has a radio in it, Mr. Dietrich. Normally, the radios are to provide communication, and in the main, this is in connection with the protection, the fire protection responsibility. So, normally, they're put in Fire Control Officers' residences. But they're not necessarily limited to those. Sometimes, they'll have one, the District Ranger will have one in his residence. This is rather a rare occasion, but oftentimes for administrative purposes, the recreation assistant or maybe the timber management officer will have one in his residence.

Q Can anyone from the outside presumably have a key, get in and use these radio instruments, some way, the use of these radios is limited, for example, to Fire Control Officers in [40] this dwelling, in the radios place?

A No, they're not restricted to fire control use. They're used for administrative purposes, any Forest Officer who has a key can go in and use the radio for whatever purpose there as long as it's in connection with his official business.

Q They are limited to the official business, these radios?

A I beg your pardon?

Q They are limited to official business, on these radios?

A Yes, right.

Q Is it done, if it happens very often, that someone with the authority, with a key, goes into the dwelling and uses a radio, or would that just depend upon the circumstances that they arose?

A I would say it would depend more upon the circumstances. I don't recall any significant number of instances where this has happened, but I know it occurs rather frequently in some areas, particularly, in remote areas.

Q Are we talking about remote areas with the 12 dwellings here?

A Not in the context that I'm using, Mr. Dietrich. It may be remote to some people, but, you see, another consideration, I think, was germane to the point here, the issue, is that by design, we actually build our Ranger Stations and our Guard Stations along the main arteries to provide public service there. We're a public service organization. They're very rarely put out at the end of a road somewhere where nobody ever goes. [41] Q You mentioned that under the rules and regulations that certain classes of employees could be required to live in certain premises, is that correct?

A Yes.

Q In the 12 premises, dwellings that we have here, back in 1967, I guess when the issue arose, were each of those dwellings filled by someone that was required to live there?

A I don't know, Mr. Dietrich.

Q Okay. Do you have certain dwellings if someone is not required to live but the—since the dwelling does exist, that you do place personnel in that dwelling?

A Yes.

Q Are they—is the individual asked if he wants the dwelling or does he come to the Forest Service and say,

"I want to live here," instead of buy an apartment or building a house?

A Well, the quarters normally are usually assigned by the District Ranger. I assume you're talking about an employee that's coming, from say, another forest or another region, he reports for work and says to the District Ranger, "where do I live?" The District Ranger says, "your quarters is the second house up on this particular street." In other words, it's—he's assigned the quarters there now. He has the option of declining that quarters, unless it happens to be that he's in a position that requires occupancy.

Q Right. They're—I'm talking about voluntary occupancy. He has the choice of living in those quarters or if he doesn't like them for whatever reason he can go [42] elsewhere?

A Yes.

Q Is there any kind of—do you know of any kind of a—well, with respect to the overall of the 12 here, percentage wise of how much your—how many of your dwellings are required to be lived in and how many are filled by the so-called volunteer where they don't have to live in them? Or does this vary all over the place?

MR. NICHOLS: Mr. Dietrich, I don't mean to interrupt you, but I'm planning on having Mr. Patchin, who is the Administrative Officer of this Forest here as a witness tomorrow morning. And I think he'll be able to help you on these points.

THE WITNESS: I think I owe him an answer. I really don't have any idea of a percentage that would be meaningful. I hesitate to quote one. I can tell you at this point in time approximately how many residences we had within region five, State of California, where occupancy was required, if that would be helpful.

MR. DIETRICH: Q Would you then continue, give me the other figure of how many were—how many dwellings you had?

A No, I don't recall.

Q Okay. Fine.

A The exact number.

Q All right. Fine. A little while ago, we talked about exclusive versus nonexclusive use. I think that's a term in your regulations. I think you read one of the regulations [43] that mentioned that. I was a little confused about what we mean when we're talking about nonexclusive use. A little—you, a little bit later, used the term "barracks". Is that what we mean by the term nonexclusive use?

A In essence, they're synonymous, Mr. Dietrich, yes. Now, the—here again, I think we have to be careful and not get confused in semantics when we talk about barracks. A residence, for example, could have three bedrooms in it but be assigned a barracks classification if it's been intended to be used for that purpose. And that, in essence, is nonexclusive use.

Now, when that classification changes and the building is assigned to a family for family occupancy, then, that, in essence, becomes exclusive use in the context of the Forest Service Regulation or our policy.

Q You can take any one of the buildings we have here, and if you have three male bachelors, I guess it doesn't make any difference any more, but three male bachelors living unrelated that would be your nonexclusive use?

A Right. You would be required to change the classification of that dwelling, and then, each employee would be required to pay a certain—or the barracks rate.

Q Then, if you have the family, consisting of a father working for the Forest Service and mother and two children, that's your exclusive possession?

A Right.

Q Like a two bed occupying a two-bedroom house?

A Yes.

[44] Q You indicated under the rules the Supervisor, even with a family just gave you, has the authority to bring someone else in, for example, a bachelor, you're talking about, let's say we had a three bedroom house, father working for the Forest Service and his wife and one child; so, they occupy two bedrooms. The Supervisor in theory under any—which under your regulations

could bring a bachelor and put him in the third bedroom?

A Yes, he has the authority to do that. There's nothing to prohibit him from doing it.

Q And then, that would change from exclusive to nonexclusive, I suppose?

A It may or it may not. It depends upon the circumstances and the length of the occupancy by the bachelor.

Q Just in for a night or something, it wouldn't change it?

A Right, if it were—

Q Three years?

A Or if it were in a situation, say, in connection with an emergency, a fire or flood emergency, and for a short duration, the classification would not change. If it were going to be a permanent sort of an arrangement, then, the classification would have to change.

Q Do you know if this ever really happens when you got the family situation?

A Not to my knowledge.

Q You've indicated that under the rules here, the Supervisor can enter any dwelling if they do something illegal. I think the regulations also provide, do they not, that a Supervisor [45] can enter to make certain kinds of inspections?

A Yes.

Q Do you know that the regulations also say that he's supposed to give—make arrangements ahead of time, to give notice?

A Well, what you might call a standard operating procedure, again as a matter of courtesy, is to notify the occupant in advance if at all possible. In some situations, it isn't possible to do this. And the authority to enter is not restricted to the Supervisor or the District Ranger, that can be delegated down. In many situations, the District Ranger delegates a responsibility for quarters inspection to his Fire Control Officer, for example.

Q For fire inspection?

A No, for any type of inspection. You know, an administrative type, whether it's for—to check the condition of the interior or the exterior of the structure, for fire,—to see whether it's being maintained properly for any number of reasons.

Q Are all these inspections—or rather, do they have something to do with the administration of the National Forest; that is, you mentioned fire, so that there are no combustible materials around, so the building won't burn down; and then, the maintenance of the building, so that no one's destroying the building. Are these inspections we're talking about when you enter the building for the purposes of protecting the building as for the United States Forest Service?

[46] A Well, primarily, right, for protecting both the building and the occupant. You see, if there is some major deficiency that needs to be corrected, that hasn't been reported, that could lead to significant cost or a problem or maybe destruction of the building itself, then, this is one of the purposes for the inspection, to identify that deficiency and correct it.

Q Do the regulations anywhere provide that a Supervisor or somebody to whom he delegates the authority could enter anyone's premises for any purpose that they want, making a sandwich or something like that out of the refrigerator?

A No. There's nothing specifically in the policy of the Forest Service Manual that—

Q That allows—

A —that says that in so many words.

Q Do you think that they can?

A I guess—I'd have to respond to that by saying, I know that they can because I've seen it happen, you know, it's an accepted practice of making not only the current inspections but if, like I mentioned previously, the Ranger suspects that there is maybe something illegal, is not as good as an example as the residence being torn up or misused, then, he doesn't have to request permission to go into a residence there.

Q Okay. That's for the inspection-type thing, to protect the premises. But what about the Supervisors or

somebody under his authority enters and they just enter to take a nap, say, they're tired and they're out on the road?

[47] A I would have to say as a matter of practice I don't know that that is done, but very rarely, maybe not at all. But it's not an uncommon practice for a Supervisor or a District Ranger to stop by, and again, as a matter of courtesy, and knock on the door. But if he doesn't get a response and he wants to use the radio, just unlock the door, walk in and use it. Now, I think it would be a rather unusual situation where he would go back to the kitchen and make himself a sandwich, but he might.

THE COURT: Take a shower?

MR. DIETRICH: Q You mentioned entry for illegal purposes raises and interesting question, because I think it's in the briefs, and I think it's part of the regulations, that of our first Exhibit, I think the regulations provide you can't have any alcoholic beverages in a Government quarters, is that correct?

A Their—I'm not sure just where that reference is, whether it's in the Code of Federal Regulations, or just where it is, but in essence, that's correct; however, it's never interpreted that literally when you're talking about a private residence. Now, it is interpreted very literally when you're talking about a dwelling in which the public is invited to come in, like an office, for example, and in some cases, even a barracks, if that's opened to the public, then, alcoholic beverages normally are restricted from being used or stored on the premises.

Q Right. It's run like an office, you don't—like in a bar, but in a private dwelling, are you saying that you [48] really don't enforce this regulation, you don't pay any attention to it?

A That's right.

THE COURT: It's honored in the breach.

MR. DIETRICH: I have no further questions, Your Honor.

THE COURT: Anything further, Mr. Nichols?

RE-DIRECT EXAMINATION

BY MR. NICHOLS:

Q Yes. Who is it, Mr. Mitchell, who determines which individual employees or which individual positions have a radio installed in their quarters that they occupy?

A The District Ranger.

Q And is this a matter of choice on the part of the employee if a given employee doesn't want to bother to have a radio, can he reject it if the District Ranger wants him to have one?

A Well, normally not. He can voice his objection, but if that's part of his job, why, he's expected to be in 24-hour communication. Then, he takes the residence with the radio.

Q You were talking about this matter of exclusive use as set forth in the regulations 6445.23. Now, in using that language, when you use the words, "exclusive use", I take it that that means a single family as a opposed to multiple family, is that correct?

A Yes.

[49] Q Now, does that—does that language intend to indicate that a single family occupant of a—of a dwelling has exclusive use of that quarters as against the District Ranger or the Forest Supervisor?

A No, not precisely. Again, not just relating it to inspection, but the Supervisor or the District Ranger have the authority to enter that quarters for whatever reason they choose to.

Q So, when you're talking about exclusive use there, you're talking about use as against other Forest Service employees, but not as against superiors?

A That's right.

Q What happens to the people who put—who put bolts, non-Forest Service bolts, on their own, are they told to take them down or does anything happen?

A I guess that relates directly to the—to the type of District Ranger that happens to be administering there. If he feels that this is in violation of a policy or that an approval was not granted in advance, and that there

really is no testifiable reason for having that interior lock on there, he will require that it be removed.

* * * *

[50] MR. NICHOLS: Q Mr. Mitchell, I just have one additional area to go into. You were discussing when we broke for lunch about some employees putting bolt locks on these cabins on their own and what would happen. Did you mean to have the Court understand that these bolt locks that they put into these cabins on their own affectively prevented any District Ranger or Forest Supervisor or person with a standard Forest Service key from securing entrance to these facilities?

A Well, usually not. I guess I'd have to say I don't know of a single instance where all doors into the dwelling have this type of lock on them. There might be another entrance and even a different type of lock, but the key for that lock would usually be kept in a District Ranger's headquarters so he or any person he designated could gain entry into the dwellings through that particular exit or entrance.

Q Even though it might have this additional bolt lock that you were talking about?

A Well, in this particular situation, I'm talking about a bolt lock that would be bolted from the inside. The occupant or the person in the bolding the door would have to be inside in order to do this. Now, in a situation I just described, you [51] could say for example, that he put a bolt on the front door because this was the most commonly used entrance by the public and of the people. And in order to protect his family, if this were the reason he put the bolt on that door, but he would not put the bolt on the rear door and that may or may not have had a Forest Service lock on it, but if it had other than a standard Forest Service lock, a duplicate key would be maintained in the District Ranger's Office so he could gain entrance if he needed.

MR. NICHOLS: I have no further Re-Direct.

MR. DIETRICH: I have no further questions, Your Honor.

EXAMINATION BY THE COURT:

Q Do you know, Mr. Mitchell,—just one question. And perhaps, you were going to go into this with another witness, and if so, we'll drop it. But I just wanted to ask you one question. You indicated that rent charges were arrived at, among other things, on a comparable basis, right?

A Yes, Your Honor.

Q Comparing with the areas. Do you know what the theory of that is, why they do that?

A Well, presumably, it's based upon comparability, and by that I mean—

Q I know what comparability is. I'm asking you why. Why is it—why is the rent arrived at, in other words, does the Government ever consider the cost of the building and trying to get some costs back and apportioning out the rental on that basis, or is it purely on this comparative rent basis?

[52] A It's purely on the comparative rent basis. And I believe that's by direction of the Bureau of the Budget.

* * * *

[54] MR. NICHOLS: Your Honor, I have one additional document at this time. Again, I think by stipulation the transcript of the proceedings before the Board of Supervisors, I would offer into evidence.

THE COURT: Now, I have a copy of that. Is this what you're— (Indicating.)

MR. NICHOLS: That's what I'm talking about. Yes.

[55] THE COURT: This transcript will be marked and received, then, in evidence, then, as Plaintiff's Exhibit No. 6.

(WHEREAS, Transcript before the Board of Supervisors was thereupon marked as Plaintiff's Exhibit No. 6 for identification and thereupon received in evidence.)

MR. NICHOLS: I would then call Mr. Robert Hensley.

ROBERT HENSLEY, called as a witness on his own behalf, having been regularly and duly sworn, assumed the stand and testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

Q Mr. Hensley, by whom are you employed?
A U. S. Forest Service.
Q And in what capacity?
A As the District Fire Control Officer.
Q Where?
A Gooseneck District of the Klamath National Forest.
Q And that's up in Yreka?
A No, that's in Mount Heberon.
Q Where?
A I beg your pardon?
Q Where is Mount Heberon?
A Siskiyou County.
Q All right. In—during the year 1967 you were employed by the Forest Service in Stanislaus County? Excuse me?
[56] A Tuolumne.
Q In Tuolumne County on the Stanislaus National Forest?
A Yes.
Q And you are one of the individual Plaintiffs in this action?
A Yes.
Q Have you in your experiences as a Forest Service employee had experience with members of the public contacting you at your residence quarters?
A Yes, I have.
Q Now, were these residences quarters private residences or residence to what you had been assigned by the Forest Service?
A Residence to which I had been assigned.

Q All right. Would you give the Court some examples of the types of contact that you have received from members of the public at these residence facilities?
A Well, the type of thing where they want to use your phone, want direction, want to use the restroom. I've had people come to the door and ask to use our restrooms or in things along that line.
Q All right. Are the residence quarters that you have occupied by the—off by themselves or are they in some sort of a compound?
A I've been in both cases.
Q All right.
A Where they've been—
Q Where were you situated when you were in the Stanislaus National Forest?
[57] A That was on a Government compound.
Q And where in the Forest was that?
A That was up at Pinecrest on Summit District.
Q All right. Is there any policy on the part of the Forest Service to encourage or discourage members of the public from contacting Forest Service employees at these residence quarters?
A Can you go over that again?
Q All right. Have you—have you received any instructions during your course as an employee of the Forest Service with reference to advising members of the public that they could be in contact with you at any residence facility if they couldn't find you at an office, for example?
A Yes. It's been my experience in the Forest Service that we have more or less felt obligated to serve the public in this way. And better to cite a case here. I was directed by a Ranger—well, at first, he got a complaint from—I brought this piece of paper here to remind me of this thing. So, the Forest Service received a complaint from Fred J.—Mrs. Fred J. Armstrong of Los Angeles County that our Office wasn't opened and the Forest Supervisor requested the District Ranger to answer this of why we weren't opened to serve the public on this day. And at that time, I was requested to change the sign on the door of the Office directing the people to

the back of the station which they would have to go by our house to get to the back of the station. But actually, in the winter time, there wouldn't be anybody there other than my wife or myself at the residence. So, [58] whenever the office was closed, why, we had this sign directing the people to the house.

Q All right. Have you had experience in using the facilities of other Forest Service employees?

A Well, in the case of fires or that—along that line, I've—I could state a case in Arizona a year before last that we had kind of a discussion in fire camp that down at so and so station, which was—I don't know that I can remember the town specifically, but down at their station, we'd get a shower down there and we'd all get together and go down to take a shower. That happens.

Q And was this done?

A Quite often on fires.

Q Was this done while the residents of that particular facility were present, or were they out, do you recall?

A They were present at—they were present at the time.

Q All right. How many of you were there? That went down?

A I think about five—about five people. I'm not sure of that, though.

Q I'm sure the Court knows where Pinecrest is, but I think I'll have you mark on this map where Pinecrest is located for any reviewing Court that might be involved. Why don't you mark it with the pen there?

A Yeah.

Q Make a big mark around it so that it can be seen easily.

A (Witness indicating.)

MR. NICHOLS: Your Honor, I would ask that this map be marked—

[59] THE COURT: Exhibit 7.

(WHEREAS, Map was thereupon marked as Plaintiff's Exhibit No. 7 for identification.)

MR. NICHOLS: Q Your position with the Forest Service at the present time is what?

A A District Fire Control Officer.

Q All right. Do you have any responsibility in connection with the keeping of Forest Service locks on facilities in your area?

A I'm responsible to the District Ranger for property on the district where I'm at now. And I also was at Pinecrest.

Q All right.

A And also, the building maintenance program or care of the buildings.

Q Now, when you say you're responsible to the District Ranger, does that mean he's delegated the authority for these things to you?

A Yes.

Q All right. Now, you heard Mr. Mitchell talking about some employees having put in locks other than standard Forest Service locks. What would your position as a maintenance officer be with reference to such individuals?

A Under the direction that I have from the District Ranger that I have now, and also at the time here, in Pinecrest, it would—we would request people to take that type of a lock off of the doors, feeling that we couldn't adequately protect the house if we left that type of lock on it. We've had this type of thing come up with—also with barracks, [60] where they felt that different people in our department, different departments within the Forest Service, such as the engineers or this type of thing coming around, would come around, could come into their station, they felt that they wanted a different lock. The District Ranger or myself would be—would still have a key to that lock, we removed that lock and had it so that anybody could get in because of the need to use it for fire.

Q Have you had any experience with being moved out of quarters on short notice?

A I haven't, but I had a—one of my Supervisors, when I was a Tanker Foreman at the Red Box Station on the Angeles, and I believe this is October of 1959, but

I'm not sure, it's Woodwardia, W-o-o-d-w-a-r-d-i-a, fire, that the assistant Fire Control Officer, and this was on the Angeles National Forest, that the assistant Fire Control Officer, Richard Doran, D-o-r-a-n and his wife and their son, were moved out of their house in order that their house could be used as a command headquarters, or that someone of the fire—the fire—had been broken into someone's house because of the size of it.

Q Do you know how much, if any, notice they were given?

A Not a specific amount. I'd say somewhere in the neighborhood of a half an hour, an hour, something like this. It wasn't very much at all.

MR. NICHOLS: All right. I have nothing further of Mr. Hensley.

THE COURT: Mr. Dietrich?

[61] CROSS EXAMINATION

BY MR. DIETRICH:

Q Mr. Hensley, what kind of quarters did you live in at Summit? Can you describe them?

A And [sic] old two-story building, three bedrooms.

Q Did you have a living room?

A Living room.

Q Kitchen?

A Kitchen, dining room and a—

Q How old would you say the quarters were?

A Oh, gosh, I don't really know what to say. I don't really know how old it was.

Q You mentioned earlier you were married. Do you have any children?

A Yes.

Q How many?

A I have two that live with me.

Q Did they live with you here when you were staying in the quarters at Summit?

A Yes.

Q How long did you stay in Government quarters at Summit?

A I think it was 1965 to 1971.

Q Six years, five or six years?

A Yeah, something like that.

Q How did you find those quarters? Were they quite adequate to your family?

A Yes.

[62] Q Do you furnish the quarters yourself in your —I mean, you own beds and chests of drawers and things like that?

A The furnishings inside of it?

Q Yes.

A Yes, except for possibly, I think, a refrigerator or a stove is allowed. It's in some places where they don't have them.

Q You mentioned that when you were at Summit, you required to put up a sign that when your office was closed, you directed the public to come around to your quarters?

A That was when I was a Foreman on the Angeles that that sign was—

Q That didn't apply here at Summit when you lived here?

A That didn't apply at Summit. I had quite a few people come to my house at Summit for the same type of thing, of restrooms or telephone calls, that type of thing—

Q There were no signs directing that?

A No. But our house was the closest one to the parking area or the street, and so, we got all the business.

Q The easiest one to get to first?

A Yes.

Q Were you ever required to either—here or was it the Angeles National Forest when you had this sign directing around to your quarters?

A Yes.

Q When were you ever required by your superiors to stay in your quarters around the clock to serve the public? In other words, when you closed your office, you went to your [63] quarters, and you had to stay there?

A I believe that I was. I'm not real sure of that. But I believe that I was. I considered that I was required and I can say that.

Q You felt it, but you're not sure whether you were directed to it?

A Yes.

Q How long did you live in Government quarters in the Angeles National Forest?

A Since 1959 to 1965, before I moved—

Q '59 until you moved here, '60—

A Yes.

Q What kinds of quarters, generally, were those same type for your family?

A I was in a barracks, and then, a one-room house. At that time, I had three of the kids living with me in the one-room house.

Q Do you now, as I understand, at Klamath Forest, do you live in Government quarters there?

A Yes.

Q What—basically, again, what kind of quarters are they?

A It's an old converted barracks into a house and—

Q Just—just your family lives there, no one else lives there at the barracks?

A Just the family.

Q You mentioned something about shower. I was a little unclear. You mentioned that you were talking with some other [64] people that you could use someone's shower at sometime in the past, and I got the impression, but I wasn't sure, that this was down in Arizona?

A Yes, this was in Arizona, and I can't think of the name of the fire that it was on, but—

Q National Forest, I assume?

A Yes.

Q Was this shower available in a Government—a dwelling like you had at Summit? Somebody was living—was a family living there?

A They were duplexes that we went to and there was a family living there, yes.

Q Did you actually go in and take a shower in there?

A Yes.

Q Do you know or did the individuals in the duplex say you could come in and take a shower because you were hot and tired, presumably because you were fighting fire, or did you take a shower because a Supervisor directed you to go use that dwelling?

A No, it was kind of a hearsay thing at fire camp that you could get a shower down in this little community, I think. I can't remember the name of the community.

Q It may have been, then,—

A From the relation to the fire camp, but anyway, there was four or five of us and we jumped in a car and went down there and we knocked on the door and we said, "we heard we could come down here and get a shower." And they said, "okay." And we went in.

[65] Q This was a Forest Service person occupying the—where the shower—

A Yes.

Q Could it have been that they were just inviting the boys in that were hot and tired from fighting the fire at their own decision?

A Could have been, I guess. I really don't know.

Q You mentioned the Woodwardia?

A Woodwardia fire.

Q Okay. You mentioned that someone else was moved out on very short notice because a Government quarters were turned into a command center?

A Yes.

Q Command to fight the fire?

A Yes.

Q Coordinating everything that you have to have to fight a fire?

A Well, it was mainly because of the power for and setting up communications and that type of thing. It was—

Q Was this particular house right near the fire?

A Yes, it was fairly close. It was about—oh, I'd say a little—possibly more than a mile, somewhere in there.

Q It was used as a command headquarters, presumable, because it was near the fire?

A It was in a place that—it was strategically best for us to use as a camp site, and also, with that type of country down there, there wasn't many places that

you could set up [66] a fire camp in the areas of the fire.

Q As I understand it, in your capacity as a District Fire Control Officer, both here at Summit and now in the Klamath National Forest, your duties are to inspect premises to protect Government property, is that it, and insure, make sure there are no fire hazards? What exactly kinds of inspections would you make?

A Well, I would make that type of an inspection, I would also make the inspection for the condition of the building of what is needed for the maintenance of that building, how they're keeping it up. This type of thing.

Q Do you ever wander into, in your capacity as a Fire Control Officer, responsible for this property, wander into somebody's property, just happen to be going by to make these inspections, or do you announce yourself ahead of time?

A Oh, I'd say that, normally, I'd strive to call around to the wives and tell them that this day I plan to come around. But on some occasions, I've just walked up to the house, knocked on the door and inspected it.

Q Do you have a check sheet of things you're supposed to check for when you go in and inspect one of these premises?

A Yes.

Q What, basically, is in that check sheet?

A Oh, questions on foundation, on the roof, flooring, that type of thing.

Q Check sheet, then, can be said—the check sheet, leads you to the type of inspection you're supposed to make, look [67] at the foundation, check yes or no, conditions like that?

A It helps you to cover everything. It's not really specific that you have to follow that inspection sheet. There have to be some type of inspection made. It doesn't specify, I don't believe, that.

Q Have you ever had anyone that you know of, Government representative, come into your quarters with this key that apparently everyone has, unannounced, to

take a nap or come in to make a sandwich, other than somebody that's not a good friend of yours?

A Well, let me see if I can put this in the right text here. My wife and I have both worked at a time for the Forest Service together. And we've had different people, since we have an understanding of the Service, that we have had different people if they were up in our area stop in and have lunch or make coffee or whatever, that type of thing has happened.

Q Well, these were people you knew ahead of time?

A This was at the Switzer Ranger Station, and that was on—

Q Were these people that you knew?

A Yes, they were people that I work with on the District.

Q You could say they're really friends, they're not strange representatives whipping in and making a sandwich?

A I've had people that I didn't know very well that have used the phone communications system in this particular house. They'd leave a note, that type of thing, they were in our house. This particular station, I'd say, is off the beaten path, and was a couple of miles off the main road. [68] And—

Q Now, you've indicated you never got moved out on real short notice yourself. What kind of notice did they give you when you moved from the Angeles National Forest here, then, from Summit up to Klamath? Did you make your arrangements ahead of time that you were going to move?

A I came back from that fire on the—Arizona, and they told me that I had been offered this job in Northern California. And I left right away to look at the job within a—I think, the next week, and we moved within about two weeks.

Q You came to the job, actually?

A Yes.

MR. DIETRICH: I have no further questions, Your Honor.

MR. NICHOLS: I have no Re-Direct, Your Honor.

THE COURT: How do you spell your last name? H-e-n-s-l-e-y?

THE WITNESS: Yes. Your Honor.

THE COURT: Thank you, Mr. Hensley. That's all.

(Witness excused.)

MR. NICHOLS: I'll call Mr. Robert Stokes.

ROBERT EDWIN STOKES, called as a witness on behalf of the Plaintiffs, having been regularly and duly sworn, assumed the stand and testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

[69] Q Mr. Stokes, what is your full name?
A Robert Edwin Stokes.
Q And where do you reside?
A In Sonora.
Q And by whom are you employed?
A The U.S. Forest Service? [sic]
Q In what capacity?
A I'm Resource Fire Control Officer on the Stanislaus Forest.
Q You are one of the Plaintiffs involved in this action, are you not?
A No, I'm not.
Q You are not. Have you had experience—strike that. How long have you been employed in the Stanislaus National Forest?
A It's a little over eight years.
Q And do you reside in Forest Service housing or private housing?
A I reside in private housing here.
Q All right. Have you at anytime in the past resided in Forest Service housing?
A Yes, I did, before I came here about—oh, close to 14 years.
Q All right. Where was that?
A On the Modoc Forest and on the Lassen Forest.
Q During your periods of residence in Forest Service

housing, did you have any experience with members of the public coming to your Forest Service quarters that you were residing in?
[70] A It's quite common, yes. People for wood permits, or information when the Office was closed, and this type of thing, or deer hunters coming for information.
Q Would there—was there a sign in your case directing them to come to your quarters or how did they happen to get there?
A Well, generally, I lived in the residence there. We lived on compounds where groups of Government buildings, residences and office buildings, and if the Office was closed, they—people that wanted information or something, they'd come and knock on doors until they finally found someone at home.
Q Would there be any—when—what time of day or night would people come knocking on your doors?
A Well, with the public you can expect them almost anytime. Anytime during the day or night, when you're home, it's just a matter of when they arrive and—and at their convenience, rather than yours.
Q Did you have any experience with the public actually coming into your quarters?
A Oh, I've had that happen once or twice, once I particularly remember. I was in bed in the morning, early in the morning, and some hunters came and door was not locked. And they proceeded to come in. They were embarrased and I was rather embarrased, too, when they realized it wasn't a public building as far as an office or something like this.
Q Have you had any experience having to move out of one Forest Facility to another?
[71] A Yes, I have, on several occasions on short notice. And one occasion on the Modoc Forest I was living in a trailer. And at the time, I was working as a scaler, and the company I was scaling for at that time or doing the Forest scaling for didn't work that particular day and I had the day off. And I awoke early in the morning and heard someone out around the trailer. And I got up and looked out to see what was

happening. And the Ranger had his pick-up backed up to my trailer and he told me on the spot, "you'd better move your things," he said, "because we need this trailer for a married couple that's arriving at some—or soon, a Fire Foreman." So, I had to move my personal belongings and get out within about an hour. And I had a similar situation happen to me on that Forest when I was living in the trailer at Buck Creek Ranger Station. And they had a new—new Forester arrived who was married and I was single. The Ranger came down and appologized [sic]. He said, "we're going to have to move this trailer, and we'd like to have you move." So, I ended up moving to the Fire Crew quarters which was a tent there at Buck Creek Ranger Station.

MR. NICHOLS: I have nothing further of Mr. Stokes.

THE COURT: Mr. Dietrich?

CROSS EXAMINATION

BY MR. DIETRICH:

Q Mr. Stokes?
A Yes.
[72] Q You indicated you resided in Forest Service housing on what, did you say, 14 years prior to your coming here?
A Yes.
Q One of these was in the Modoc National Forest?
A Yes.
Q What kind of quarters did you reside in? You've indicated you moved out of trailers a couple of times?
A Well, I lived in numerous kinds; trailers, tents, camped at Camian, when I lived there, I lived in a two-bedroom house, a small, two-bedroom house. I lived in barracks there on a number of districts, and I guess, this about covers the types.
Q And I take it you were single when they moved you around. Are you still single?
A No, thank goodness.

Q Did you ever get moved out of a permanent quarters, a single family dwelling that you were in, on real short notice; as I understand, the two occasions you mentioned when you were in trailers?
A That's right.
Q Mobile homes?
A No, I never did.
Q Didn't get moved out of a regular, real house?
A I had moved out for—on a personal basis.
Q Well, you made the decision?
A I made the decision.
Q Have you ever had any kind of a Government housing you lived in, Forest Service Supervisor or anyone acting under [73] him come into your house without notice, and come back to the same thing, make a sandwich, go to your refrigerator or cook some food?
A I don't recall ever having had this happen.

MR. DIETRICH: I have no further questions, Your Honor.

MR. NICHOLS: Nothing further of Mr. Stokes.

THE COURT: That's all, Mr. Stokes. Thank you.

(Witness excused.)

MR. NICHOLS: Mr. Thomas Ralls?

THOMAS WILLIAM RALLS, called as a witness on his own behalf, having been regularly and duly sworn, assumed the stand and testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

Q Mr. Ralls, state your full name please?
A Thomas William Ralls.
Q And where do you reside?
A At the Forest Service Compound in Groveland.
Q And if I may have Government Seven? I'm sure Judge Carkeet knows, but would you mark where Groveland is on this map?

THE COURT: I not only know, but I've been to his house, is that right, Mr. Ralls?

THE WITNESS: Right.

MR. NICHOLS: Your Honor, I would now—now that the [74] two areas that we're talking about in this case are marked, I would offer the map into evidence.

THE COURT: He marked the Groveland Ranger Station, right?

MR. NICHOLS: Yes.

THE COURT: All right. Exhibit 7 is also marked to show the location of the Groveland Ranger Station.

MR. NICHOLS: Q You are one of the Plaintiffs in this action, are you not, Mr. Ralls?

A Yes, I am.

Q Have you had any experience as an employee of the Forest Service living in Forest Service quarters of being contacted by members of the public at your residence facility?

A Yes, very numberous [sic] times.

Q Would you tell the Court what the nature of these contacts have been?

A Here again, do through the proximity of living on a compound, being close to an office, and when that is closed, mine is the closest house, again, where people can get information, and it could be any time of the night or day or anything from validating deer to just a map or anything of that nature.

Q How frequently, would you say, that you are contacted at your house as best as you can estimate?

A Oh, it varies, but I would say over the whole year, probably at least twice a week. Now, through, like I say, the hunting season or things like that, there are peaks, but on an average, probably throughout the whole year, it's [75] probably a couple times a week.

Q Have you had any experience with either being moved in or moved out of Forest Service quarters on any kind of a short notice basis?

A No. With one exception, I was offered a detail at one time, and this was a case where it was my choosing to take this detail and on the spur of the moment, I moved, the wife and I, in a period of prabably a day's time. But we retained the building and it was for our use when we came back.

Q Well, how long were you gone?

A Approximately two months.

Q Do you know whether—strike that. What is your position with the Forest Service?

A I'm a District Fire Control Officer.

Q Do you have similar inspection obligations to what Mr. Hensley has testified to?

A Yes, I do.

Q And is your—what—what have your experiences been in conducting those inspections?

A I'm not real clear on—what do you mean by experiences?

Q Well, do you have a policy that you follow in conducting the inspections? Do you give two weeks notice before you're going to come and inspect, or do you go in without notice or what?

A No, I try to give notice if at all possible, unless it's something of an emergency nature that is occurring or something on this order. But yes, I try to set up a head of [76] time when an inspection is going to be made because, normally that—there is no rush.

Q And why do you do this, because you're required to, or simply as a matter of courtesy?

A As a matter of courtesy.

Q Do you have any experience with the use of radios in your facility?

A Yes, I do.

Q And what has that experience been?

A Well, on this particular Forest, anyway, being in the Fire Control Office, I have a Forest Service radio in my house; that is, it's monitored year-round, and it's available for—for—to keep me in 24-hour communications.

Q Does anybody use it besides yourself?

A They could.

MR. NICHOLS: I have nothing further of Mr. Ralls, Your Honor.

CROSS EXAMINATION

BY MR. DIETRICH:

Q Mr. Ralls, as I understand it, you occupy Government quarters at Groveland?

A Yes.

Q Can you generally describe the type of quarters you live in?

A Well, it's a—what is referred to as a class A-type building, three bedrooms, front froom [sic], kitchen, dining room, [77] combination bath.

Q Are you married?

A Yes, I am.

Q Do you have any children living in there?

A Yes, I do.

Q They live with you in these quarters?

A Yes.

Q Do you find them adequate?

A Yes.

Q How long have you lived in that—in the quarters you live in now?

A Quarters I live in now, I've only lived there since about January of last year.

Q January, 1971?

A Yes. However, I have lived in on the Government compound since May of 1965 when I was transferred here.

Q In other words, you lived at Groveland in a different house from May, '65 until January of '71?

A Right.

Q Then, you moved?

A Yes.

Q Would you tell me why you moved?

A At my request.

Q Who did you ask, your Supervisor?

A Yes. I talked to the District Ranger and I've increased the size of my family since I came to Tuolumne County, and the house that I'm presently in was bigger

and I asked if I could not move into this one, and it was granted.

[78] Q Have you held any social functions in your Government quarters, such as a get together for the Tuolumne County Grand Jury?

A Yes, I have.

Q Has—the reason I ask this, it was mentioned earlier that the premises are supposed to be used for officially approved purposes. I suppose that would be for the benefit of the Federal Government. Did any one of your Supervisors say anything that would indicate you shouldn't do this or criticize you for it?

A No.

Q Did you serve alcoholic beverages when you had that—

A Yes.

Q Get together? You mentioned that individuals often come to your door. Are you required to stay in your quarters any certain period of time after the normal work day to receive people that might come in?

A No.

Q Just your own choice when you're there and—

A Yes.

Q People see the light on and come in? Do you know if anyone while you've been occupying Government Quarters, somebody with a key working for the Forest Service has ever come into your premises and taken a shower or use [sic] your refrigerator or anything like that without your permission?

A Not that I know of, no.

Q Now, in your capacity of a District Fire Control Officer, you indicated that you do make these inspections. And as a [79] matter of policy, you give as much advance notice as possible. Is that your own policy or did you get this from discussing with the District Ranger or someone else?

A No, I—it's my own policy.

Q Developed that yourself?

A Yes.

Q Have you ever had any discussions with the District Ranger or anything like that about—has anyone ever

told you you can slip right into a place for these inspections without any kind of a notice?

A No.

Q You just developed your own policy?

A That's right.

MR. DIETRICH: That you give as much notice as possible. I have no further questions, Your Honor.

MR. NICHOLS: I have no Re-Direct, Your Honor.

THE COURT: That's all, Mr. Ralls. Thank you.

(Witness excused.)

MR. NICHOLS: Mr. Robert Semmens?

ROBERT KEITH SEMMENS, called as a witness on his own behalf, having been regularly and duly sworn, assumed the stand and testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

Q Would you state your full name for the Court please?

[80] A Robert Keith Semmens.

THE COURT: Is that S-e-m-m-e-n-s?

THE WITNESS: Correct.

THE COURT: Thank you.

MR. NICHOLS: Q You are one of the Plaintiffs in this action?

A Yes, I am.

Q And you are employed by the Forest Service?

A That's correct.

Q In what capacity?

A At the present time, I'm the Recreation Officer on the Shasta Lake Ranger District, on the Shasta-Trinity National Forest.

Q And during the year 1967, you were employed in the Stanislaus National Forest?

A Thats' right.

Q And where do you—where did you reside at that time?

A At that time, I was residing at Pinecrest.

Q And what was your position at that time?

A I was Recreation Assistant on that District.

Q Were you aware of the existence of a standard lock on the Forest Service quarters at that time?

A Yes, I was.

Q And did you have any experience with members of the public coming to your facilities?

A In several cases, if the clerk couldn't handle the problem that say, occurred at the office concerning recreation, residents in the Pinecrest area or some other problem dealing [81] with recreation, they have referred the people to actually come back to the residence to talk to me there.

Q We've been talking about a compound. Could you give us sort of a description of what we're talking about as the compound at Pinecrest?

A Well, at Pinecrest, there's, oh, four or five residents involved with maybe three or four trailers and along with the office and the warehouse complex.

Q And about how large an area does this cover?

A Oh, I imagine maybe two or three acres.

Q Did you—how long did you reside at Pinecrest?

A We arrived there in April of '66 and left in August of '69. It was for about three, three and a half years.

Q And during the period of time that you were there, did—were there inspections of your facility conducted?

A Yes, there was.

Q About how many would you say?

A Oh, at least once a year, and possibly twice or more, if there was other problems involved.

MR. NICHOLS: I have nothing further of Mr. Semmens.

CROSS EXAMINATION

BY MR. DIETRICH:

Q Mr. Semmens, can you describe the quarters you occupied at Summit?

A Again, it was a standard class A-type of quarters. It was—

[82] Q Class A, three bedrooms?
A Three bedrooms, living room, kitchen, dining room.
Q Are you married?
A Yes.
Q Do you have any children living at home?
A Right.
Q How did you find the quarters, were they adequate for your family?
A They were adequate but small.
Q You've moved to another National Forest, is that correct?
A That's correct.
Q Are you living in Government quarters there?
A No, we're living in the city of Redding.
Q When you have the inspections we were just talking about, were you given advanced notice by the Fire Control Officer, whoever did the inspection. He was coming?
A In most cases, he would probably let me know ahead of time that he was coming. And then, either he would contact my wife or I would let her know that he would be coming by.
Q Have you ever been moved out of Government quarters on real short notice?
A No, I haven't.
Q Day or—have you ever had anybody, to your knowledge, and Official of the Forest Service, come into your quarters, use your shower or take a nap, use your refrigerator or stove without your approval?
A No, there has been no one do anything like that.
[83] Q In your quarters at Summit, did you have a radio? The Forest Service radio that connected them with their network at headquarters?
A At that time, no.
Q No?
A (Witness shakes head negatively.)
MR. DIETRICH: Thank you. I have no further questions, Your Honor.
MR. NICHOLS: I have no Re-Direct, Your Honor.

THE COURT: That's all, Mr. Semmens. Thank you.
(Witness excused.)
MR. NICHOLS: Mr. Carl Westrate.

CARL GARY WESTRATE, called as a witness on his own behalf, having been regularly and duly sworn, assumed the stand and testified as follows:

DIRECT EXAMINATION

BY MR. NICHOLS:

Q Would you state your full name please?
A Carl Gary Westrate.
Q And by whom are you employed?
A U.S. Forest Service.
Q And in what capacity?
A Assistant Branch Chief, Division of Recreation, San Francisco.
Q And prior to your assuming that position, what was your [84] position with the Forest Service?
A A District Ranger at the Summit Ranger District on the Stanislaus.
Q And for how long a period of time were you District Ranger at Summit?
A Two years.
Q And when was that?
A 1966 through 1968.
Q During—how long have you been employed by the Forest Service?
A 18 years.
Q During your period of employment with the Forest Service, have you had occasion to either move people out of Government facilities or to be moved out yourself?
A Not to be moved out myself. I've had to move in on people for emergency purposes.
Q All right. Would you tell the Court what was involved?
A Fire. We had to use the residence for base quarters. This is at the Brightman Ranger Station.

Q And what was the family that you were moved in with, did they remain in the facility or were they moved out?

A They elected to leave.

Q Were they required to leave?

A No.

Q Do you know? For how long a period of time were you moved in?

A Approximately two, three days.

Q And after you—after you left, did this family move [85] back into the facility, to your knowledge?

A Yes.

Q Do you know how much notification was given to this family that you were going to be moving in, if any?

A All they knew it was bound to happen, in that they were in the barracks as a fire headquarters, then we moved into the residence approximately a day, half a day.

Q Have you had any experience concerning the making of improvements or modifications to Forest Service quarters?

A In my capacity as Ranger, no improvements were made unless it was clear to myself or had I had delegated the maintenance work, too.

Q All right. Did you—were your—were your decisions concerning improvements or modifications subject to review, or were you the end of the line as far as those decisions went?

A I'd say I was end of the line, as far as the district was concerned, residences on that district.

MR. NICHOLS: That's all I have, Your Honor.

THE COURT: Mr. Dietrich?

CROSS EXAMINATION

BY MR. DIETRICH:

Q Mr. Westrate, when you were the District Ranger at Summit, did you occupy Government quarters?

A Yes.

Q One thing I guess, are you a Plaintiff, one of the individual Plaintiffs in this case?

[86] A Yes, I am.

Q You indicated for two years did you live in the same Government quarters?

A The same residence for the two-year period.

Q Can you generally describe the quarters you occupied?

A Three-bedroom residence.

Q Did you occupy that with a family? Are you married with children?

A I was at the time, yes.

Q You indicated on one occasion in your capacity as District Ranger moved into somebody's quarters. Was that the Brightman?

A Brightman, yes.

Q As I understand, that's not at Summit compound where the other Government quarters are, that's further up the road?

A That's further up the highway.

Q Are these quarters at Brightman the same type of quarters we have at Summit that you occupied at Summit?

A No.

Q How are they different? Are they not as good quarters?

A Much smaller, either one or two bedroom, the residence building.

Q Are those quarters at Brightman occupied yearround?

A No, they weren't at that time.

Q At that time, when were they occupied, just in the summer time?

A Just the summer season. The highway closes and that country is closed off.

Q This is above, though?

[87] A Yes.

Q You indicated you moved into these quarters, was it Command headquarters for fire?

A No, it was our own communications, so it served as part of the Command post.

Q For a fire?
A Yes.
Q Was the fire right near there, was that—
A A couple miles further up the highway.
Q Why did you move into this particular house?
A Primarily for the phone communications.
Q Because the phones were already there?
A Yes.
Q You indicated that in your capacity as District Ranger and decisions made about residences, you were the end of the line as to the decision. Is this just within the district over which you had command?
A Yes.
Q If somebody didn't like what you told them about the residences of the Summit District, could they go higher I presume to the—I guess to the Supervisor ruling the whole National Forest?
A They could go to the Supervisor, yes.
Q So, let me ask you this, can they go any higher than the Supervisor of the Stanislaus National Forest if they didn't like this?
A They could request audience with the Regional Forester.
Q They can—that line of commnuication is opened in theory?
[88] A The line of communication is open beyond. However, the authority was delegated to me as District Ranger on that district for the maintenance on the improvements.
Q I understand. If someone didn't like it, they could go higher?
A (Witness nods head affirmatively.)
Q Did you in your capacity as District Ranger ever go in unannounced to anyone's quarters to use the facility, other than a radio or telephone, something like that, go in and take a shower?
A No. Specifically, not a shower or to eat their food in the refrigerator. To use the phone communications or the radio, yes.
Q Would you say it would be fair that at least when you were District Ranger at Summit, that—were in-

spections or any other official visits you tried to give as much notice as possible, unless, for example, you had to use the phone, you had to use it, then, no notice was given?
A Right, no notice. As far as checking for inspections, this—it was delegated further. My Fire Control Officer who was—at that time, who was Bob Hensley.
Q Did you ever have any discussion for giving notice?
A No.
Q Or just leave it up to the individual?
A It's just common courtesy.
Q Had you lived in Government quarters prior to your coming to Summit?
A Yes.
[89] Q Where did you live prior to coming to Summit?
A Six years at Adon, California, on the Modoc National Forest.
Q Modoc National Forest?
A Yes.
Q Is that six years in one?
A No.
Q Pardon?
A No to your question. You said, "six years in one?" No, not six years in one residence.
Q You were not six years in one residence?
A No, three years in one and three years in another.
MR. DIETRICH: Thank you. I have no further questions, Your Honor.
MR. NICHOLS: I have no Re-Direct, Your Honor.
THE COURT: That's all, Mr. Westrate.

* * * *

[91] MR. NICHOLS: Yes, Your Honor. At this time, I'll call Mr. Robert Patchin.

ROBERT J. PATCHIN, called as a witness on behalf of the Plaintiff, having been regularly and duly sworn, assumed the stand and testified as follows:

[92] DIRECT EXAMINATION

BY MR. NICHOLS:

Q Would you state your full name please?
A Robert J. Patchin.
Q And by whom are you employed?
A U.S. Forest Service.
Q In what capacity?
A Administrative Officer.
Q For what Forest?
A Stanislaus National Forest.
Q And how long have you been employed in that capacity?
A June 1966.
Q And up until the present?
A Until the present time.
Q All right. Are you aware of the procedures that are followed in the Stanislaus National Forest, both now and during the year 1967, with regard to quarters rental to employees of the Stanislaus National Forest?
A Yes. I think I—basically, all of the procedures that we follow.
Q Are there any modifications or supplements or changes included in any of those procedures that differ from the procedures set forth in the Forest Service manual or the R-5 Western Regional Supplemental to the Forest Service manual?
A Not as far as I know. The operation of the Forest, basically, is the following the policy in the manual.
[93] Q All right. The individuals who are the Plaintiffs in this action, can you tell the Court where each of them was residing during the month of March, 1967?
A At the Summit Ranger District, the Pinecrest Ranger Station, the residence at—on the date of March 6th, 1967, are as follows: Building number 1011 was Daniel Slattel; building number 1015 was Robert J. Semmens; in building 1005, Robert C. Hensley; in building 1012, Carl G. Westrate; building 1009, John R. Siles; in building 1110 was M. N. Holloway; at the Groveland Ranger Station in building 1015, Samuel G. Mock; building 1016, John Rusk, Jr.; building 11004, James R. Alvis; building 1006, Tom W. Ralls; building 1002, Ryle A. Gilky; and building 1001, Curtus W. Bates.

Q Was there any policy at that time and at the present time concerning individual positions being assigned to particular quarters?
A The basic policy as provided in out [sic] manual guidance that occupancy could be required under certain circumstances, but from the records that we have on the forest, I find no written record to any individual that did require occupancy on his part from the written record.
Q Were there any oral understandings relating to this subject?
A I would have to say, knowing the operation some 20 years, 22 years of experience in this organization, that I've got to assume that the occupancy was a matter of the position and the house for probably at least four posotions [sic] on these two stations.
Q And what would those positions have been?
[94] A And that would be the District Ranger, who was the unit head of the Ranger District, and the District Fire Control Officer, who was prime responsibility for the fire activity on the district.
Q And so, there would have been a District Ranger and the Fire Control Officer at Pinecrest and a District Ranger and a Fire Control Officer at Groveland?
A Yes.
Q Who would those individuals have been?
A At Pinecrest in 1967, the District Ranger was Carl Westrate, and the Fire Control Officer was Robert Hensley. And at Groveland, the District Ranger was John Rusk, and the Fire Control Officer, Tom Ralls.
Q Was there any distinction in the relationship between those individuals in the Forest Service and the other eight Plaintiffs whose occupancy would not have been required even on an oral understanding basis?
A Yes. I think the basic difference there was the nature of the two positions; one being the unit head of the Ranger District and the District Fire Control officer, who has the—more or less, the 24-hour responsi-

bility in his capacity as District Fire Control Officer, as opposed to the other occupants of the dwellings that are in other activities and do not have that nature of responsibility to the organization.

Q All right. Would there have been any difference in the conditions of occupancy, not leaving aside the question of whether it was required or permissive would there have been any other difference in the conditions of occupancy?

[95] A I guess one of the—I'm not sure what you're—I'm not sure your exact question, but maybe one of the differences would be the District Fire Control Officer, who has a radio, for instance, in his house, that by the nature of his position in the employment, why, he's more or less expected to monitor that radio as that is his business; that other positions do not have this.

Q Would those people have their rent paid in the same—or withdrawn from their paychecks in the same manner as the other eight?

A Yes. No difference.

Q Would they be subject to inspection by their superiors as well as the other eight?

A Yes.

Q Would they be prohibited from making modifications to their quarters without the consent of their superiors?

A Yes.

Q As well as the other eight?

A Everyone in quarters treated equally.

Q Any other differences of this type between these four and the other eight?

A I think the basic differences, again, is the nature of the two positions of responsibility to the management of the District Ranger.

Q So, the difference would be related to the job rather than to the occupancy?

A Yes. Yes.

MR. NICHOLS: I think I have nothing further, Your Honor.

[96] THE COURT: Mr. Dietrich?

CROSS EXAMINATION

BY MR. DIETRICH:

Q Mr. Patchin, what does the Administrative Officer do on your job?

A Trying to explain that to my wife for 22 years. Really.

Q Well, I mean,—

A I would say similar to your Administrative Officer in the County organization. It's responsible for the business management, activities of the management and administration of the National Forest.

Q In business management, then?

A Yes.

Q Do you—in this business management, are you the one in charge of the Government quarters involved here?

A No.

Q Oversee—

A No, not in charge. No. There's a responsibility connected with quarters management or use, but not in charge.

Q Okay. What kind of responsibility do you have toward these quarters in your capacity as an Administrative Officer?

A I would say the validity or accuracy of occupancy, rates being charged, and that type of thing. Not the management of the improvements, but the management of the paper or legal-related things to occupancy.

Q Are you familiar with all these 12 individual dwellings [97] that are involved in this case?

A Basically, yes.

Q What kind of dwellings are we talking about? Are we talking about mobilehomes, trailors or fire lookouts?

A In the case of the ones that I named, occupied in March of '67, these were all buildings. These were all buildings.

Q In a general location, are they way out in the hinderland or are they in areas accessible by road?

A Well, the Groveland Ranger Station is on Highway 120, oh, at approximately six or eight miles east

of the town of Groveland, in a location that has no other improvements with the immediate vicinity. And the Summit Ranger Station is right in middle of the Pinecrest complex on Highway 108.

Q In talking about radios in these various quarters, did I understand it that only in two of these quarters where the Fire Control Officer resided were Government official radios?

A As far as I know, these were—these are the only positions if they're occupying Government quarters, that radios are part of the job.

Q One in Groveland for the Fire Control Officer and one at Summit?

A As far as I know. Now, there could be more, but those two I'm aware of.

Q Do you know if the—or does the Stanislaus National Forest, this particular Forest, have any written policys, rules or regulations about inspections? Type of notice that has to be given to or that should be given to someone [98] before an inspection is made?

A Not beyond what is in our manual through the Washington Office and Regional Office supplements. There is no spec for—

Q Nothing—

A There's no need for that.

Q Have you ever occupied Government dwellings such as we have involved in this case?

A Yes.

Q Was that here in the Stanislaus National Forest?

A No.

Q Sometime prior to 1967?

A Yes.

MR. DIETRICH: I have no further questions, Your Honor.

MR. NICHOLS: I have no Re-Direct, Your Honor.

THE COURT: That's all, Mr. Patchin.

(Witness excused.)

MR. NICHOLS: Your Honor, I have no further witnesses. I would ask at this time that the Court take judicial notice of the interrogatory propounded by the

Plaintiff and the answer of the Defendant to interrogatory number two, which sets forth the specific description of the property on which the possessory interest assessments were made against the individual Plaintiffs. And I understand that Mr. Dietrich is in agreement—

MR. DIETRICH: Yes.

MR. NICHOLS: —that that be done.

THE COURT: Well, this is the Answers to Interrogatories?

[99] MR. NICHOLS: It was the Government's interrogatories, and the County of Tuolumne's answer.

THE COURT: The Defendant's answer to interrogatory number two?

MR. NICHOLS: That's correct, Your Honor. And it's my understanding that all of the Exhibits heretofore marked are in evidence?

THE COURT: Yes, they are.

(WHEREAS, All Plaintiff's Exhibits heretofore marked for identification were thereupon deemed in evidence.)

MR. NICHOLS: And I have no further evidence, then, Your Honor. The Government rests.

THE COURT: All right. The Government rests. The Plaintiff rests. Mr. Dietrich, do you have anything?

MR. DIETRICH: Yes, Your Honor, I would have no witnesses to call in this matter.

• • • •

PLAINTIFFS' EXHIBITS 3 THROUGH 5

Plaintiffs' Exhibit 3 is the same as Plaintiffs' Exhibit 2 in the Fresno County case, *supra*, pp. 140-166.

Plaintiffs' Exhibit 4 is the same as Plaintiffs' Exhibit 3 in the Fresno County case, *supra*, pp. 167-189.

Plaintiffs' Exhibit 5 is the same as Plaintiffs' Exhibit 1 in the Fresno County case, *supra*, pp. 123-139.

SUPREME COURT OF THE UNITED STATES

No. 75-1262

UNITED STATES, ET AL., APPELLANTS

v.

COUNTY OF FRESNO; and
UNITED STATES, ET AL., APPELLANTS

v.

COUNTY OF TUOLUMNE

APPEAL from the Court of Appeals of California, Fifth Appellate District.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

May 19, 1976

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1262

UNITED STATES OF AMERICA, ET AL.,
Appellants
vs.
COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL.,
Appellants
vs.
COUNTY OF TUOLUMNE

On Appeals From the California Court of Appeal,
Fifth Appellate District

Motion to Dismiss or Affirm

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1262

UNITED STATES OF AMERICA, ET AL.,
Appellants

VS.

COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL.,
Appellants

VS.

COUNTY OF TUOLUMNE

On Appeals From the California Court of Appeal,
Fifth Appellate District

Motion to Dismiss or Affirm

The Appellee, COUNTY OF FRESNO, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Court of Appeal, Fifth Appellate District on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

STATEMENT OF THE CASE

A. The Statutes

This appeal raises the question of the validity of certain state statutes as applied to possessory interests of United States Forest Service employees in residences owned by

the Federal Government and located in the national forests and assigned to said employees for use as single. family residences.

California Revenue and Taxation Code Section 201 requires Appellee's Assessor to assess all property in the County not exempt by law from taxation. California Constitution Article II, Section 12, provides all such property shall be assessed at its full cash value. California Constitution Article XIII, Section 1, provides that all property shall be taxed unless specifically exempt. California Revenue and Taxation Code Section 103 defines "property" as "all matters and things, real, personal and mixed, capable of private ownership. "Revenue and Taxation Code Section 104 defines real property as including "(a) possession of, claim to, ownership of, or rights to the possession of land including improvements."

Title 18 of the California Administrative Code, Section 21 (b) provides " 'Taxable Possessory Interest' means a possessory interest in non-taxable publicly owned real property, as such property is defined in Section 104 of the Revenue and Taxation Code and in taxable publicly owned real property subject to the provisions of Section 3 (a), (b) and 11, Article XIII of the (California) Constitution.

Excluded from the meaning of 'Taxable possessory interest' is any possessory interest in real property located within an area to which the United States has exclusive jurisdiction concerning taxation. Such areas are commonly referred to as enclaves."

B. The Proceedings Below

In 1967 Appellee made assessments of the individual appellant's possessory interests in the personal living quarters, single family residences, assigned to and rented by them from their employer, appellant United States of

America, in both the Sierra National Forest and Sequoia National Forests, located within the County of Fresno. The employees paid such taxes, which amounted to a total of $134.55 for the seventeen (17) employees, under protest and applied to Appellee's Board of Equalization for cancellation of the assessment and refund of the taxes paid. Their applications were duly denied, and this litigation followed. The Trial Court found in favor of Appellants, and its judgments were appealed by Appellee County to the Court of Appeal of the State of California, Fifth Appellate District. That Court at *U.S.A. v. County of Fresno* 50 CA 3d 633 reversed the Trial Court's decision, and held, as a matter of law, that appellants enjoyed taxable possessory interests in such housing, and that the Constitutional issues raised by Appellants were unfounded, and remanded the cases back to the Trial Court for further hearing on the valuation issues. Appellants then petitioned the California Supreme Court for a hearing, which was denied.

II
ARGUMENT

This case presents no substantial questions not previously decided by this Court.

Basically two questions are presented by Appellants in seeking the Court's plenary review of the decision of the State District Court of Appeal, upholding these taxes. Both questions have been previously considered and decided by the Court.

1. Whether the imposition of such possessory interest taxes against the personal property rights of government employees, somehow violates the immunity of the United States from state taxation as provided in the Supremacy Clause of the United States Constitution; and

2. Whether such tax is repugnant to the Supremacy Clause and thus unconstitutional because it discriminates against the Federal Government and its employees.

In dealing with the first question, two factors should be noted.

a. That there was absolutely no evidence offered or admitted in the trials of this case that the imposition of these taxes on the employee's right of possession and occupancy had, or could have had any adverse effect or infringement on the rights, interests or duties of the Federal Government in discharging its obligations in the National Forests.

b. That Congress has not provided for any immunity from local taxation of private interests, including that of Federal employee's personal housing, in the National Forests.

From its genesis as a state, California Courts have recognized and upheld state and local taxation of private person's possessory interests in Government, tax exempt land. *People v. Naglee* (1850) 1 Cal 232 (state license fee on foreigners working in the gold mines); *People v. Shearer* (1866) 30 Cal 645 (assessment of property interest of adverse possessor of Government land); *Kaiser v. Reid* (1947) 30 Cal 2d 610 (tax imposed against possessory interest of shipbuilder in shipyards leased from United States); *McCaslin v. DeCamp* (1967) 248 CA2d 13 (employee's housing of tax exempt entity); *Board of Supervisors v. Archer* (1971) 18 CA 3d 717 (assessment of private grazing leases on United States Forest Service land).

This Court has consistently and repeatedly held that there is no inference of immunity from state taxation, but rather that there must exist clear and persuasive proof that the imposition of such taxes, as is the case here, will result in a burden on or intereference with the activities of

the Federal Government. *Hibernia Bank v. San Francisco* (1906) 200 U S 310; *Helvering v. Mountain Producers Corporation* 303 U S 376, 386; *Graves v. New York* 306 U S 466; *Penn Dairies v. Milk Conirol Commission* 318 U S 261.

This Court has considered and upheld the propriety of State possessory interest assessments against government property in possession of a private contractor in *City of Detroit v. Murray Corporation of America* 355 U S 589 distinguishing its earlier decision in *United States v. County of Allegheny* 322 U S 174 and stating at 355 U S 495:

> "We find nothing in the Constitution which compels us to strike down these state taxes. There was no discrimination against the Federal Government, its property, or those with whom it does business. There was no crippling obstruction of any of the government's functions, no sinister effort to ham-string its power not even the slightest interference with its property. Cf *M'Cullough v. Maryland* (U S) 4 Wheat 316."

In *United States v. City of Detroit* 355 U S 466 a similar possessory interest tax was upheld, the Court again at 355 U S 471, distinguishing this case from its holding in *United States v. County of Allegheny* 322 U S 174, at 184:

> "Whether such right to possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. . . . Actual possession and custody of government property nearly always are in someone who is not himself the government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationships by way of salary, profit, or *beneficial personal use of the property may be taxed as we have held.*" (emphasis added)

The Court in *United States v. City of Detroit, supra,* p. 477, upheld the tax "imposed on a party using tax exempt property for its own 'beneficial personal use' and 'advantage.'"

The cases cited, *supra,* clearly support the decision of the State District Court of Appeal, in upholding these taxes.

The cases cited by Appellant in its Jurisdictional Statement, are easily distinguished from the case at bar, and when this is done, it seems obvious that in fact no substantial questions remain for plenary review by the Court.

In the case of *United States v. Mississippi Tax Commission* 421 U S 599, cited by Appellant, a state sales tax on sales of liquor by out of state distillers to military installations within Mississippi was held to be unconstitutional. The Court found that "post exchanges and similar facilities were instrumentalities of the United States", and the tax was actually paid by the military out of non-appropriated fund activities. In the case at bar, the tax does not fall on any instrumentality or facility of the United States.

Kern-Limerick, Inc., v. Scurlock 347 U S 110, involved a state sales tax imposed on the sale of tractors to a private contractor of the government. The Court determined that the government was in fact the purchaser, and therefor the tax could not be imposed. This decision is inapposite to the case at bar.

United States v. Richert 188 U S 432, decided in 1902, involved a state property tax on lands allotted to and personal property of the Indians, which was declared unconstitutional, based on the dependent condition of the Indians to the United States.

A somewhat similar case, reflecting the more recent feeling of the Court as to the present day business of the Indian tribes, is *Mescalero Apache Tribe v. Jones* 411 U S

145 in which a use tax levied against an off-reservation ski enterprise of the tribe, on land leased from the Federal Government by the tribe, was upheld.[1]

The California Possessory Interest tax is by reason of this analysis, not a tax upon the Federal Government, its facilities or activities, and therefore does not violate Article VI, United States Constitution.

The second question raised is whether the subject tax discriminates against the Federal Government and its employees.

Appellants assert at page 13 of their Jurisdictional Statement "that the California tax unfairly discriminates against the Federal Government because it is not imposed upon possessory interests in state forests." This statement is simply untrue. All California counties, including Appellee, assess and collect the tax on possessory interests in land and improvements owned by tax-exempt entities, including the State of California's employees, furnished housing thereon as part of their duties. This is true, even though Appellee County has no state owned forests within its boundaries. California Public Resources Code Section 4654 provides for in-lieu payments by the state to the counties in which state forest lands are situated "based only upon the value of forest lands used for purposes of continuous commercial forest productions and not upon value of forest land used for any other purposes, including any improvements on such lands"; thus possessory interests in publicly owned improvements in both the State and Na-

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1. An excellent discussion upholding the California Possessory Interest Tax as applied to lessee's interest in Indian Tribal lands, held in trust by the United States can be found in *Agua Caliente Band of Mission Indians v. Riverside County* 442 F 2d 1184. Cert. denied 405 U S 933; rehearing denied 405 U S 1033; rehearing denied 409 U S 901.

tional Forests, are treated identically for purposes of state property taxation.

The issue of whether 16 U S C 500 provides in-lieu payments of taxes from the National Forests, and thus precludes state taxation of private possessory interests therein, was squarely decided adversely to Appellant's contention by this Court in *Wilson v. Cook* 327 U S 474, which upheld an Arkansas statute which taxed severed timber cut on Forest Service lands.

The same question was most recently raised in the Ninth Circuit Court of Appeals case of *International Paper Company v. County of Siskiyou* 515 F 2d 285 in which that Court held that 16 U S C 500 must be construed with 16 U S C 480, which provides:

> "The State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."

The state tax on possessory interests in the unsevered timber was upheld, and the claim of discrimination rejected.

From the above discussion it seems obvious that there remains no substantial question which requires further argument. In addition, it seems clear that the decision of the Fifth District Court of Appeal is correct. It is only fair and just that federal employees, who reside in residential housing owned by the United States located outside of federal enclaves, be assessed and pay a tax based on their personal beneficial use and occupancy thereof. Appellee provides many services to the individual Appellants in the form of safety, health, welfare and education, which are

dependent for funding through the County's real property tax. If the individual plaintiffs who are not solely federal employees but also with their families, citizens of the County and State are not required to pay their fair share of these taxes, an increased burden of taxation is transferred to the other taxpayers, in order for Appellee to provide essential services.

Paraphrasing from the language of *People v. Shearer* cited, *supra*, at page 657, "Why should (they) not contribute (their) proper share, according to the value of (their possessory interests) whatever it may be, of the taxes necessary to sustain the government which recognizes and sustains (them)?"

III

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeal of the State of California, Fifth Appellate District.

Respectfully submitted,

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Supreme Court, U. S.
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No. 75-1262

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

COUNTY OF TUOLUMNE

ON APPEALS FROM THE CALIFORNIA COURT OF APPEAL, FIFTH APPELLATE DISTRICT

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

County of Fresno. The findings of fact, conclusions of law, and memorandum of decision of the California Superior Court (J.S. App. A 1a-14a) are not reported. The opinion of the California Court of Appeal, Fifth Appellate District (J.S. App. B 61a-71a), is reported at 50 Cal. App. 3d 633.

County of Tuolumne. The findings of fact, conclusions of law, and memorandum of opinion of the

California Superior Court (J.S. App. A 19a-56a) are not reported. The opinion of the California Court of Appeal, Fifth Appellate District (J.S. App. B 72a-73a) is not reported.

JURISDICTION

The judgments of the California Court of Appeal in these cases (J.S. App. B 71a, 72a-73a; J.S. App. C 74a-77a) were entered on August 13, 1975. The California Supreme Court denied timely petitions for hearing on October 9, 1975 (J.S. App. D 78a-79a). Notices of appeal to this Court were filed on January 6, 1976 (J.S. App. E 80a-83a).[1] By order dated December 30, 1975, the Chief Justice extended the time for docketing these appeals to and including March 7, 1976. The appeals were filed on March 5, 1976, and probable jurisdiction was noted on May 19, 1976 (A. 289).

The California Court of Appeal held that the imposition of a state possessory interest tax upon the occupancy by employees of the United States Forest Service of government-provided housing quarters located in national forests did not violate the Supremacy Clause of the United States Constitution. The jurisdiction of this Court is conferred by 28 U.S.C. 1257(2), which authorizes a direct appeal to this Court from the final judgment by the highest court of a state in which a decision could be had where the constitutionality of a state statute is drawn into question and

[1] Notices of appeal were filed in both the California Court of Appeal (J.S. App. E 80a-83a) and in the California Superior Courts (J.S. App. F 84a-87a) because of uncertainty as to the location of the record. In the *County of Fresno* case, the notice of appeal was filed in the Superior Court on January 7, 1976.

the decision is in favor of its validity. See, *e.g., Agricultural Bank* v. *Tax Commission,* 392 U.S. 339; *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of Article VI of the United States Constitution, 5 U.S.C. 5911, 16 U.S.C. 500, and Sections 102-104, 107 and 201 of the California Revenue and Taxation Code (West 1970) are set forth in the Appendix, *infra,* pp. 27-32.

QUESTION PRESENTED

Whether the imposition of the California annual tax on possessory interests in improvements on tax-exempt land based upon the value of the occupancy rights of employees of the United States Forest Service in government-owned housing located within national forests and assigned to them to occupy in connection with their official duties violates the immunity of the United States from state taxation provided by the Supremacy Clause of the Constitution.

STATEMENT

1. The United States Department of Agriculture is responsible for executing the laws affecting the public lands reserved as national forests. See 16 U.S.C. 471 and 472. Pursuant to 16 U.S.C. 480, the civil and criminal jurisdiction of the states within such national forests is not affected. In order to protect and administer the national forests, the Forest Service of the Department of Agriculture has constructed housing quarters within the national forests which it assigns

to Forest Service employees to occupy in connection with their duties. The assignment of federal employees to such quarters is authorized by 5 U.S.C. 5911(b) "when conditions of employment or of availability of quarters warrant the action" (J.S. App. A 1a, 3a-4a, 9a-10a, 24a, 31a, 43a).

The individual appellants are employees of the Forest Service who were assigned to duty stations in the Sierra, Sequoia, and Stanislaus National Forests, which are located in Fresno and Tuolumne Counties in California. In connection with their duties of protecting, maintaining, and administering the national forests, appellants were assigned to occupy government-owned housing located within these three national forests. The housing ranged from one-bedroom to three-bedroom units and many of them were in remote areas of the national forests (J.S. App. A 1a-3a, 9a-11a, 20a-21a, 24a-25a, 30a, 43a, 50a-51a; A. 4, 11, 15, 213, 221).

In accordance with the criteria set forth in 5 U.S.C. 5911, the Bureau of the Budget Revised Circular No. A-45 (Pltf. Exh. 1, A. 123-139),[2] and the Forest Service Manual (Pltf. Exhs. 2, 3, A. 140-189), the Forest Service unilaterally made the housing assignments of its employees solely on the basis of its needs. Because there are more Forest Service employees than such housing, every such facility was occupied. The Forest Service employees assigned to the quarters located within the national forests were charged an occupancy

[2] "Pltf. Exh." refers to the plaintiff's exhibits in the *Fresno County* Case. The Plaintiff's Exhibits 1, 2, and 3 (A. 123-189) in the *Fresno County* case were respectively admitted as Plaintiff's Exhibits 5, 3, and 4 in the *Tuolumne County* case (A. 227-228, 288) but have not been separately reproduced in the appendix.

fee. The fee was computed in accordance with an official schedule that took into account the number of amenities provided by the facility and its distance from an established community (J.S. App. A 1a-3a, 12a, 27a-30a, 44a, 51a; J.S. App. B 63a; A. 21-23, 28-33, 48-50, 53, 63, 67, 70, 72, 75, 85, 87; Pltf. Exh. 1, A. 123-139; Pltf. Exh. 2, A. 140-141, 144-165; Pltf. Exh. 3, A. 172-185; A. 231-235, 244-245, 253, 255). The fee was based upon the number of days of occupancy during the preceding pay period and was withheld from the employees' bi-weekly pay checks (J.S. App. A 2a-4a, 31a, 45a; J.S. App. B 63a; A. 30, 49, 120, 235-236).

The Forest Service housing assignments are of two types: (1) required occupancy, and (2) permissive occupancy. With respect to required occupancy, 5 U.S.C. 5911(e) provides that "[t]he head of an agency may not require an employee or member of a uniformed service to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise" (see Pltf. Exh. 2, A. 142). In accordance with this statutory directive, the Forest Service Manual authorizes Forest Supervisors to require specific employees to occupy specific Government quarters "only when there is no other way to acquire a specific service or that Government property cannot be adequately protected" (J.S. App. A 28a; Pltf. Exh. 3, A. 167).

The Forest Service Manual further provides that an employee will be required to occupy government-owned housing quarters if his occupancy is necessary to: (a) provide service to the public; (b) protect natural resources; (c) operate necessary equipment; and (d) pro-

tect government property in special situations. Examples of the types of employees in these categories are recreation aides at heavily used remote areas, log scalers and those controlling the movement of logs, fire control personnel who either need to be immediately available for fire suppression duties or who are stationed at specific locations according to an approved fire plan, and certain employees at nursery or research installations. In addition, Regional Foresters and Experiment Station Directors are authorized to require occupancy for certain employees who are assigned custodial duties (J.S. App. A 3a-4a, 30a-31a; J.S. App. B 63a; A. 37-38, 40; Pltf. Exh. 2, A. 143; A. 234).

The Forest Service also provides housing quarters for its employees on a permissive occupancy basis. As in the case of required occupancy housing, such facilities are provided because suitable privately-owned quarters are not available in many of the remote areas in the national forests. Permissive occupancy of government-owned dwellings is ordinarily limited to short-term fire control employees, district rangers, nurserymen, timber-sale officers, forest supervisors and staff. Permissive occupancy assignments of housing quarters are made by the Forest Service on the basis of a "most efficient use" policy (J.S. App. A 2a, 11a, 31a, 44a; J.S. App. B 63a; A. 40, 141).

The most significant factors taken into account in determining the most efficient use of a particular housing unit are the relative position of the employee and the established use of the facility. For example, certain dwellings are set aside for district fire control officers and such employees would have priority in the assignment of those quarters. An employee who is entitled

because of his position to housing on a permissive occupancy basis may decline the assignment only if his Forest Supervisor will agree to let another employee live in the dwelling. Other employees may decline permissive occupancy housing assignments. However, the Forest Service requires that each dwelling unit be occupied by one of its employees (J.S. App. A 31a, 33a, 43a-44a; J.S. App. B 63a; A. 40-42, 88-89, 236, 247-248).

The assignment of housing with respect to both required and permissive occupancy quarters is dictated by the needs of the Forest Service. The employees have no right to participate in the assignment decisions. Thus, the conditions of occupancy for all Forest Service employees are subject to the identical restrictions whether a housing assignment originates on a required or permissive occupancy basis. (J.S. App. A 1a-5a, 11a, 36a-37a, 43a; A. 63, 72, 235, 248, 253, 284).

The privacy of the Forest Service employees occupying the government-owned housing quarters is severely diminished. The Forest Service retains full rights of access to these dwellings. The units are locked by Forest Service locks, which can be opened by a single Forest Service master key to which all Forest Service employees have access. Forest Service officers are permitted to enter these quarters at any time to check on their maintenance and are at liberty to station additional personnel in the quarters if conditions make it necessary. For example, one fire control technician testified that during an emergency nine additional people were stationed in his house on one hour's notice. Finally, the public is authorized to visit Forest Service employees at their housing quarters when other Forest

Service facilities are closed (J.S. App. A 2a, 4a, 5a, 11a, 32a-35a, 38a-39a, 44a, 53a; J.S. App. B 63a-64a; A. 43-44, 46-47, 57-58, 64-65, 69, 74, 79, 81, 84-87, 104, 238-239, 242-243, 245, 249-253, 256-262, 264-265, 267-268, 270-271, 277, 280).

Forest Service employees have no fixed right to the particular housing they occupy, whether their assignment is on a required or permissive occupancy basis. There is no written lease or other document between the employees occupying such quarters and the Forest Service. The employees' occupancy is immediately terminable at any time without any prior notice by the Forest Service. The employees have no right to sublet or to assign their right of occupancy and are permitted to make repairs, alterations, or modifications to the units only with the consent of their superiors. Pursuant to Section 0.735-11(p) of the Forest Service Regulations (7 C.F.R. (1971)), the employees are prohibited from using the quarters "for other than officially approved purposes" (J.S. App. A 2a, 4a-5a, 11a-12a, 31a-32a, 35a, 37a-38a, 45a, 52a-53a; J.S. App. B 63a; A. 33, 40, 43-46, 52, 53, 56, 72, 87, 234, 239-242, 244-245, 278).

2. Under Sections 103, 104, 107 and 201 of the California Revenue and Taxation Code (West 1970), the counties of California are authorized to impose an annual tax upon possessory interests in improvements on tax-exempt land. Respondents determined that the government-owned housing [3] occupied

[3] The Forest Service also leased privately-owned houses located near national forests and assigned such dwellings to its employees as in the case of government-owned housing (A. 33-37). However, respondents did not seek to tax the employees' possessory interests in such housing.

by the individual appellants in connection with their federal employment were possessory interests in improvements on tax-exempt land and were thus subject to the tax. They computed the value of the possessory interests in the improvements by computing the discounted value of the rent of a comparable dwelling (economic rent) exclusive of land and the value of the reversionary interest after the estimated period of occupancy. Respondents excluded from their calculations the value of office or other governmental areas that were open to the public and took into account the risk of termination of occupancy. After deriving two separate values based upon the capitalization of economic rent and the valuation of the property less the reversionary interest, a final appraisal was made in accordance with the judgment of the appraiser (J.S. App. A 2a, 10a, 51a; J.S. App. B 62a; A. 15-16, 95, 100-111, 205-206).[4]

The Forest Service employees paid the assessed tax [5] in 1967 under protest and filed applications for refund, which were denied by respondents' boards of supervisors sitting as boards of equalizations (J.S. App. A 2a, 10a-11a, 25a, 51a-52a). In the first of these refund suits in which the individual appellants were joined by the United States, the Superior Court of Fresno County held that the Forest Service employees had no

[4] The description of the assessor's determination of the value of the possessory interest is based upon the testimony in the *County of Fresno* case (see A. 15-16, 95, 100-111). For a description of the valuation procedures used by the County of Tuolumne, see J.S. App. A 40a-42a.

[5] The taxes imposed on the individual appellants ranged from $3.03 to $91.31 for 1967 (J.S. App. A 10a, 15a-18a, 21a, 25a, 51a, 58a-60a).

possessory interests subject to tax. The court further held that, even assuming that they had such a taxable interest, the California possessory interest tax interfered in the relationship between the Forest Service and its employees and violated the constitutional immunity of the United States and its agents from state taxation. The court also ruled that the tax unconstitutionally discriminated against the United States and its employees, and was a forbidden double tax upon the possessory interests in federal forests under Section 102 of the California Revenue and Taxation Code because the United States made payments in lieu of taxes under 16 U.S.C. 500 (J.S. App. A 4a, 6a-7a, 12a-14a). In the second case, the Superior Court of Tuolumne County held that the individual appellants had no possessory interests under California law and did not reach the other issues presented (J.S. App. A 48a, 53a-55a).

The California Court of Appeal reversed in both cases (J.S. App. B 61a-73a). It held that under California law the Forest Service employees had taxable possessory interests in the government housing quarters assigned to them and that the imposition of the tax did not violate the immunity of the United States against state taxation. In the court of appeal's view, "[a] possessory interest assessment is not made against the government or government property; the assessment is against the private citizen, and it is the private citizen's usufructuary interest in the government land that is being taxed" (J.S. App. B 68a).

SUMMARY OF ARGUMENT

In *McCulloch* v. *Maryland,* 4 Wheat. 316, this Court first announced the doctrine that the federal government is immune from state taxation. "[U]nshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." *United States* v. *County of Allegheny,* 322 U.S. 174, 177. See also *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 117-118; *Department of Employment* v. *United States,* 385 U.S. 355; *United States* v. *Mississippi Tax Commission,* 421 U.S. 599, 612-613. Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared" (*McCulloch* v. *Maryland, supra,* 4 Wheat. at 436).

This case presents a classic violation of the *McCulloch* doctrine. The California tax upon the possessory interests of federal Forest Service employees in housing quarters assigned to them by the federal government in order to permit them to perform their duties respecting the national forests is a levy upon the activities of the United States. California could not subject the United States to a real estate tax upon the value of its ownership interest in the housing located within the national forests. While the possessory interest in those quarters of the Forest Service employees assigned to them may be conceptually distinguished from the ownership interest of the United States, the employees' occupancy of such quarters was for the sole purpose of discharging their governmental function of running the national forests. Thus, the fact that they paid rent and perhaps derived some incidental personal benefits from their occupancy does not negate that their presence in such housing was primarily for the benefit of the United States in fur-

therance of its governmental activities. A state tax on such activity violates the Supremacy Clause of the Constitution.

In upholding the tax, the court of appeals relied upon *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, *United States* v. *Township of Muskegon*, 355 U.S. 484, and *United States* v. *City of Detroit*, 355 U.S. 466. But those cases involved the distinguishable situation of a state tax upon a private contractor's use of federally-owned property in connection with its own commercial activities. Under these circumstances, the tax was upheld because the private contractor was not deemed to be an instrumentality of the United States. Here, however, the immunity we claim is the fundamental constitutional prohibition that inheres in the Supremacy Clause against direct state taxation of the functions of the federal government carried out by government employees and not the implied immunity of "private persons seeking to clothe themselves with governmental character." *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 352. Under that well-established immunity of the federal government, the California tax cannot stand.

ARGUMENT

THE IMPOSITION OF THE CALIFORNIA POSSESSORY INTEREST TAX UPON THE OCCUPANCY RIGHTS OF FEDERAL EMPLOYEES IN GOVERNMENT-OWNED HOUSING QUARTERS ASSIGNED TO THEM TO OCCUPY IN CONNECTION WITH THEIR DUTIES VIOLATES THE CONSTITUTIONAL IMMUNITY OF THE UNITED STATES FROM STATE TAXATION

A. INTRODUCTION

"[S]ince 1819, when Chief Justice Marshall in * * * [*McCulloch* v. *Maryland*, 4 Wheat. 316] expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application." *United States* v. *County of Allegheny*, 322 U.S. 174, 176. In determining the reaches of that constitutional immunity, the Court has often considered whether property belonged to the United States under particular arrangements with private parties or whether particular entities were federal instrumentalities. "But unshaken, rarely questioned * * * is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation" (*id.* at 177). See also *Kern-Limerick, Inc.*. v. *Scurlock*, 347 U.S. 110, 117-118; *Department of Employment* v. *United States*, 385 U.S. 355, 358-359; *First Agricultural Bank* v. *State Tax Commission*, 392 U.S. 339, 340; *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 612-613. Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared." *McCulloch* v. *Maryland, supra*, 4 Wheat. at 436.

This case involves an application of a state tax to the activities of the federal government itself and not to a private contractor acting on behalf of the federal government. Thus, the immunity we claim here is the fundamental constitutional prohibition against direct state taxation of the functions of the federal govern-

ment carried out by government employees and not the implied immunity of "private persons seeking to clothe themselves with governmental character." *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 352. Just as the celebrated *McCulloch* decision established that the State of Maryland could not impose a stamp tax upon the circulation of currency by the Second Bank of the United States, the California county tax upon the occupancy of Forest Service employees in housing owned and assigned to them by the federal government is likewise an unconstitutional levy upon the United States.

The tax immunity of the United States covers the Forest Service and its personnel. While the Court has employed various formulations to determine whether institutions or individuals have governmental immunity (see, *e.g.*, *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485. See also *United States* v. *Boyd*, 378 U.S. 39, 48; *Department of Employment* v. *United States*, *supra*, 385 U.S. at 358-359), the Forest Service is entitled to immunity from state taxation as an integral part of the government itself. It is therefore beyond question that appellees Fresno and Tuolumne Counties could not subject the United States to a real property tax upon either the value of the land encompassing the national forests within their borders or the value of its ownership interest in the housing located within the national forests. While the possessory interests of the Forest Service employees in the housing units assigned to them may be conceptually distinct from the ownership interest of the United States, the occupancy of such quarters by the Forest Service personnel was for

the sole purpose of discharging their governmental function of running the national forests. As we shall now demonstrate, the assignment of such housing was an activity of the federal government which the states are forbidden to tax as a consequence of the Supremacy Clause.[6]

B. THE CALIFORNIA TAX IS AN UNCONSTITUTIONAL LEVY UPON THE ACTIVITIES OF THE FEDERAL GOVERNMENT

1. Article IV, Section 3, of the Constitution empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." In the exercise of this constitutional authority, Congress has made the Department of Agriculture responsible for executing the laws affecting the public lands reserved as national forests. See 16 U.S.C. 471 and 472. In order to protect and administer the national forests, the Forest Service has constructed housing quarters throughout these areas which it requires its employees to occupy. By so doing, the Forest Service is able to maintain constant surveillance over these natural preserves in order to protect them against fire or other calamity and to serve the public for whose enjoyment the national forests were set aside. The assignment of federal employees

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[6] In our Jurisdictional Statement (pp. 13-14), we also argued that the possessory interest tax unlawfully discriminated against the United States and its employees. However, after consulting with officials of the California Department of Conservation and its personnel assigned to the State forests, we have concluded that there is no present factual basis to the discrimination claim. We therefore no longer advance the argument that the tax discriminated against the federal government.

to such dwelling units is authorized by 5 U.S.C. 5911 (b) "when conditions of employment or of availability of quarters warrant the action" (Appendix, *infra,* p. 28).

Here, Forest Service employees were assigned to occupy government-owned housing quarters in national forests located within appellee Counties of Fresno and Tuolumne in California. Those assignments were made unilaterally by the Forest Service solely on the basis of its needs in accordance with the criteria set forth in 5 U.S.C. 5911, and Bureau of the Budget and Forest Service policy directives. Certain Forest Service employees were required to occupy such quarters after it was determined "that necessary service [could] not be rendered, or that property of the Government [could] not adequately be protected, otherwise" (5 U.S.C. 5911 (e), Appendix, *infra,* pp. 29-30). Other employees were assigned to such quarters (unless they could find a substitute) because of their status or as a result of the Forest Service's policy that required each dwelling to be occupied.

Apart from these differences in how a housing assignment originated, all of the Forest Service employees' rights in their dwellings were subject to the identical restrictions. The employees were prohibited from using the quarters "for other than officially approved purposes" (7 C.F.R. 0.735-11(p) (1971)). Their occupancy was immediately terminable at any time without any prior notice by the Forest Service, and additional employees could be assigned to a dwelling unit with no advance notice in an emergency. Moreover, the employees' superiors had full access to the housing quarters because the units were locked by Forest

Service locks which could be opened by a single master key. Finally, the public was authorized to call upon these personnel in their quarters when other Forest Service facilities were closed, for the purpose of receiving assistance.

This undisputed summary description of the Forest Service employees' rights in the housing quarters confirms that their occupancy arose out of their status as government employees and was solely for the purpose of enabling them to protect and administer the national forests. Indeed, the closest analogy to the Forest Service's system of linking the housing and duty stations of its employees is the deployment by the armed forces of personnel to the various military installations upon which the government maintains similar housing facilities. In both cases, the process of assigning personnel must be administered with maximum flexibility in order to meet exigent circumstances and the assignment of housing is dictated by the nature and location of the employee's duty station.

Moreover, the continuous nature of the duties of the armed forces and the Forest Service render the housing units of their personnel essentially supplementary duty stations. Finally, like the members of the armed forces, the employees of the Forest Service are engaged in the public service and Congress has determined by the enactment of 5 U.S.C. 5911 that the provision of housing to them is necessary to insure the effective performance of their functions. See *United States* v. *Phisterer,* 94 U.S. 219, 224; *Jones* v. *United States,* 60 Ct. Cl. 552, 570, 574.

Once it is recognized that the assignment of the housing to Forest Service personnel is in furtherance

of the discharge of their public duties, the error of the California Court of Appeal in upholding a state possessory interest tax upon their occupancy rights in such quarters becomes readily apparent. If, as the decision below held, the states could levy such a tax, they could effectively impose conditions upon the residence of Forest Service personnel in the national forests within their borders and thereby interfere with the federal program of protecting the national forests. See *Van Brocklin* v. *Tennessee,* 117 U.S. 151, 179; *Mayo* v. *United States,* 319 U.S. 441, 447. Our system of federalism therefore wisely rejects such taxation of the national government by its constituent parts. Cf. *Crandall* v. *State of Nevada,* 6 Wall. 35, 43-49.

To be sure, the value of the possessory interests might be mathematically carved out of the concededly tax-exempt ownership interests of the United States, as the tax assessors attempted to do in these cases (see A. 15-16, 95, 100-111; J.S. App. A 40a-42a). But the federal government created these possessory interests for the sole purpose of protecting and administering the national forests. There is accordingly no constitutionally permissible way to isolate any "personal residence" portion of these possessory interests that could be deemed to be unrelated to the official duties of these Forest Service employees.

They were expected to maintain constant watch over the national forests and their occupancy of these quarters was solely to enable them to do so. The fact that they paid rent and perhaps derived some incidental personal benefits from their occupancy does not justify a state tax upon their possessory interests when their presence in such housing was primarily for the benefit of the United States.

Indeed, the existence of such indirect personal benefits to government employees cannot support the imposition of a state tax upon the activities of the federal government in the face of the absolute constitutional prohibition against such state interference. For example, the members of the armed forces wear government-issued uniforms in the performance of their duties. But no one would suggest that a state could levy a use tax upon those who wear such uniforms even though the uniforms also serve the personal clothing needs of the wearer. The relationship of uniforms to the performance of military duties is inseparable from the personal benefits that may be derived from their use. A state tax upon soldiers' use of military uniforms would be an unconstitutional levy upon the activities of the federal government.

Similarly, here, the imposition of the California tax on the value of the occupancy rights of federal employees stationed in the national forests is barred by the tax immunity of the United States provided by the Supremacy Clause. As this Court observed almost a century ago in *Van Brocklin* v. *Tennessee, supra,* 117 U.S. at 155-156, "[t]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[7]

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[7] *Van Brocklin* held that all property owned by the United States was exempt from state taxation, even though the State had not acquiesced in the federal acquisition of the property nor ceded exclusive jurisdiction to the United States. Significantly, the

2. a. The decisions of the Court confirm the foregoing analysis. For almost a century, the Court has consistently rejected attempts by the states to tax property to which the United States held title but chose to place in the hands of individuals for the purpose of carrying out a government program. In *United States* v. *Rickert,* 188 U.S. 432, the Court held that improvements made upon lands belonging to the United States but which were put in possession of Indians for their benefit remained immune from state taxation and that cattle, horses and chattels purchased by the federal government and "put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them" (*id.* at 444) were likewise immune from state taxation.[8]

Similarly, in *Irwin* v. *Wright,* 258 U.S. 219, the Court prohibited state taxation of lands owned by the federal government and occupied by homestead entry-

Court in *Van Brocklin* (117 U.S. at 169) expressed doubt as to the correctness of *People* v. *Shearer,* 30 Cal. 645, upon which appellees rely (Motion to Dismiss or Affirm, pp. 4, 9).

[8] *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, upon which appellees rely (Motion to Dismiss or Affirm, pp. 6-7), is distinguishable. There, the Court upheld a state gross receipts tax on a ski resort operated by an Indian tribe on off-reservation land that the tribe leased from the federal government. Although Section 5 of the Indian Reorganization Act (48 Stat. 985, 25 U.S.C. 465) exempted the land from state and local taxation, the Court held that neither the statute nor the federal immunity doctrine bars taxing income from the land. In that context, the tribe was acting as a private entrepreneur. However, the Court further ruled that the statute prohibited the imposition of a state use tax on personalty that the tribe purchased out of state and which was installed as a permanent improvement on the land so as to become part of the land itself. But cf. *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, holding that a state has no power to tax income of Indians wholly derived from reservation sources.

men who were in the process of clearing the land and making it arable in order to qualify for title to the tracts they reclaimed by their efforts. Cf. *S. R. A., Inc.* v. *Minnesota,* 327 U.S. 558, 566-570. Finally, in *United States* v. *County of Allegheny, supra,* the Court struck down a state *ad valorem* personal property tax on machinery owned by the federal government and leased to a private party for the purpose of permitting it to manufacture military ordnance under a government contract. The fact that the federal government had placed its property in the hands of a private contractor did not permit the state to tax the property as if it belonged to the private contractor.

This case follows *a fortiori* from these decisions. For if the states cannot tax federally-owned property which is held by a private party in order to carry out a federal program, they cannot tax property of the United States held by federal employees for the purpose of discharging their official duties. The Forest Service and its employees perform "functions indispensable to the workings" of the government and are therefore nothing less than "an arm of the Government" itself. *Department of Employment* v. *United States, supra,* 385 U.S. at 359-360. Under such circumstances, the occupancy rights of the Forest Service employees in their assigned housing quarters are immune from state taxation.

b. Although the California Court of Appeal acknowledged the force of the federal tax immunity doctrine, it held that it was inapplicable here because "[a] possessory interest assessment is not made against the government or government property; the assessment is against the private citizen, and it is the pri-

vate citizen's usufructuary interest in the government land and improvements alone that is being taxed" (J.S. App. B 68a). In support of its characterization of the California tax, the court relied upon *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, *United States* v. *Township of Muskegon*, 355 U.S. 484, and *United States* v. *City of Detroit*, 355 U.S. 466.

Those cases are distinguishable. They upheld a possessory interest tax upon the use of government property by private parties rather than by government employees as in this case. The Michigan tax was imposed upon the use of tax-exempt property by "a private individual, association or corporation in connection with a business conducted for profit * * *" (*United States* v. *City of Detroit, supra*, 355 U.S. at 467-468, n. 1). Thus, the Michigan levy involved the different situation of the imposition of a state tax upon a private contractor's use of federally-owned property in connection with its own commercial activities. The tax was therefore not imposed upon government property as such but on the private contractor's possessory interest in the property.

The tax was upheld because the private contractor was not deemed to be an instrumentality of the United States.[9] Indeed, the Court's rationale in those cases

[9] *Wilson* v. *Cook*, 327 U.S. 474, *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184 (C.A. 9), certiorari denied, 405 U.S. 933, *People* v. *Naglee*, 1 Cal. 232, *Kaiser* v. *Reid*, 30 Cal. 2d 610, 184 P.2d 879, and *Board of Supervisors* v. *Archer*, 18 Cal. App. 3d 717, upon which appellees rely (Motion to Dismiss or Affirm, pp. 4, 7, 8), are similarly distinguishable because they all involve private contractors who were not federal instrumentalities.

Penn Dairies, Inc. v. *Milk Control Commission*, 318 U.S. 261, cited by the California Court of Appeal (J.S. App. B 68a) and appellees

confirms their inapplicability to the California tax at issue here. The Court stated in *Township of Muskegon* (355 U.S. at 486):

> The case might well be different if the Government had reserved such control over the activities and financial gain of [the private contractor] that it could properly be called a "servant" of the United States in agency terms. But here [the contractor] was not so assimilated by the Government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in per-

(Motion to Dismiss or Affirm, p. 5), does not support the imposition of the California tax. There, the Court upheld Pennsylvania's refusal to renew the license of a milk dealer who had sold milk to a military facility at prices lower than the state statutory minimum. In the Court's view, the state regulation imposed no prohibition upon the United States or its officers and the burden imposed was no greater than upon any other private contractor engaged by the government (see 318 U.S. at 270).

Thus, *Penn Dairies* did not involve the federal government's absolute immunity from state taxation upon which this case turns. Moreover, the federal regulation there contained an exception to the general policy of competitive procurement " 'when the price is fixed by federal, state, municipal or other competent legal authority' " (see *id.* at 277). It also contained provisions manifesting a "hands off" policy with respect to state minimum price laws (*id.* at 276, 278). Thus, unlike this case, the federal regulation appears to have contemplated the exercise of state control so as to constitute a waiver of the federal immunity from state regulation that would otherwise have been applicable. Indeed, it was on this basis that the Court subsequently distinguished *Penn Dairies* in *Paul* v. *United States*, 371 U.S. 245, 254-255, in which it invalidated California's minimum price regulation as applied to milk purchased by military installations from appropriated funds.

forming its contracts and maximizing its profits from them.

The Forest Service employees are servants of the United States in the fullest sense of that word, since their activities are under the complete and direct control of their federal employer. Moreover, their occupancy of the housing is subject to a pervasive system of governmental controls directly related to the operation and protection of the national forests. Their assignment to their dwellings is an integral part of their employment and they had no right to remain there unless the federal government so directed. Thus, the Michigan tax upon the possessory use of government property by a private contractor "free to use the property as it thought advantageous" is hardly precedent for a state tax upon the assigned use of government property by government employees under detailed limitations and restrictions.[10] Such a tax, we submit, cannot stand under the Supremacy Clause.

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[10] *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, upon which appellees rely (Motion to Dismiss or Affirm, p. 5), does not support the decision below. There, the Court upheld a state income tax upon the salary of an employee of the Home Owners' Loan Corporation, a federal instrumentality. In upholding the tax, the Court rejected the argument that a state tax upon the income of a federal employee was a tax upon its source so as to impose a burden upon the federal government (see 306 U.S. at 480-487). The decision in that case was presaged by *Helvering* v. *Gerhardt*, 304 U.S. 405, which had held that the salaries of employees of the New York Port Authority were not immune from the federal income tax.

But the state income tax approved in *Graves* is a far cry from the California tax upon the occupancy rights of the Forest Service personnel in this case. The federal government has no further interest in wages paid to its employees, who are free to spend them in any way they choose. Thus, a nondiscriminatory state income tax imposed upon the wages of federal employees does not run afoul of the Supremacy Clause. Here, however, the Forest Service employee's housing is assigned to him as part of his employment and in furtherance of the performance of his duties. Thus, in a very real sense, the California tax is imposed upon the performance of his functions and therefore interferes with the operations of the federal government. See *Mayo* v. *United States, supra*, 319 U.S. at 447.

CONCLUSION

For the reasons stated, the judgments of the court of appeal should be reversed.

Respectfully submitted.

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JULY 1976.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article VI of the Constitution provides in part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Section 13 of the Act of May 23, 1908, 35 Stat. 260, as amended, 16 U.S.C. 500, provides:

> *Payment and evaluation of receipts to State for schools and roads.*
>
> Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided,* That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein. In sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by

this section shall be based upon the stumpage value of the timber.

3. The Act of September 6, 1966, 80 Stat. 508, 5 U.S.C. 5911 provides:

Quarters and facilities; employees in the United States.

(a) For the purpose of this section—

(1) "Government" means the Government of the United States;

(2) "agency" means an Executive agency, but does not include the Tennessee Valley Authority;

(3) "employee" means an employee of an agency;

(4) "United States" means the several States, the District of Columbia, and the territories and possessions of the United States including the Commonwealth of Puerto Rico;

(5) "quarters" means quarters owned or leased by the Government; and

(6) "facilities" means household furniture and equipment, garage space, utilities, subsistence, and laundry service.

(b) The head of an agency may provide, directly or by contract, an employee stationed in the United States with quarters and facilities, when conditions of employment or of availability of quarters warrant the action.

(c) Rental rates for quarters provided for an employee under subsection (b) of this section or occupied on a rental basis by an employee or member of a uniformed service under any other provision of statute, and charges for facilities made available in connection with the occupancy of the quarters, shall be based on the reasonable value of the quarters and facilities to the employee or member concerned, in the circumstances under which the quarters and facilities are provided, occupied, or made available. The amounts of the rates and charges shall be paid by, or deducted from the pay of, the employee or member of a uniformed service, or otherwise charged against him in accordance with law. The amounts of payroll deductions for the rates and charges shall remain in the applicable appropriation or fund. When payment of the rates and charges is made by other than payroll deductions, the amounts of payment shall be credited to the Government as provided by law.

(d) When, as an incidental service in support of a program of the Government, quarters and facilities are provided by appropriate authority of the Government to an individual other than an employee or member of a uniformed service, the rates and charges therefor shall be determined in accordance with this section. The amounts of payment of the rates and charges shall be credited to the government as provided by law.

(e) The head of an agency may not require an employee or member of a uniformed service to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Gov-

ernment cannot adequately be protected, otherwise.

(f) The President may prescribe regulations governing the provision, occupancy, and availability of quarters and facilities, the determination of rates and charges therefor, and other related matters, necessary and appropriate to carry out this section. The head of each agency may prescribe regulations, not inconsistent with the regulations of the President, necessary and appropriate to carry out the functions of the agency head under this section.

(g) Subsection (c) of this section does not repeal or modify any provision of statute authorizing the provision of quarters or facilities, either without charge or at rates or charges specifically fixed by statute.

4. Sections 102-104, 107, and 201 of the California Revenue and Taxation Code (West 1970) provide:

§ 102. *Double taxation forbidden*

Nothing in this division shall be construed to permit double taxation.

§ 103. *Property*

"Property" includes all matters and things, real, personal, and mixed, capable of private ownership.

§ 104. *Real estate or real property*

"Real estate" or "real property" includes:

(a) The possession of, claim to, ownership of, or right to the possession of land.

(b) All mines, minerals, and quarries in the land, all standing timber whether or not belonging to the owner of the land, and all rights and privileges appertaining thereto.

(c) Improvements.

§ 107. *Possessory interests; security for payment of taxes; seizure and sale for delinquent taxes; suit against assessee*

"Possessory interests" means the following:

(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

(b) Taxable improvements on tax-exempt land.

Except as provided in this section, possessory interests shall not be considered as sufficient security for the payment of any taxes. Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre, are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.

In the event of delinquency in the payment of any installment of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for the seizure and sale of possessory interests in Sections 2914 to 2919, inclusive, at any time within three years

after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof.

§ 201. *Property taxable*

All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code.

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In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1262

UNITED STATES OF AMERICA, et al.,
Appellants,

vs.

COUNTY OF FRESNO
Appellee.

UNITED STATES OF AMERICA, et al.,
Appellants,

vs.

COUNTY OF TUOLUMNE
Appellee.

On Appeal from the California Court of Appeal,
Fifth Appellate District

Brief for Appellee, County of Fresno

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Argument:

The California possessory interest tax imposed on the personal occupancy rights of federal employees in their Government-owned housing does not violate the constitutional immunity of the United States from state taxation.

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In the

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October Term, 1976

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County of Tuolumne
Appellee.

On Appeal from the California Court of Appeal,
Fifth Appellate District

Brief for Appellee, County of Fresno

STATEMENT

1. Respondent, County of Fresno, generally agrees with the *Statement* as set forth in the Brief for the Appellants. It should be stated, however, that the government housing which was assessed and taxed to the individual employees, were in all cases occupied by the employee, his wife and children, if any, as their personal residence. The only areas in such housing which were considered for purposes of determining the value to the employee thereof were the family living portions. i.e. living room, bedrooms, bath-

rooms. Furthermore, only such housing as was classified by the Government as "exclusive" i.e. exclusive possession to the employee were assessed by respondent. (Plaintiffs Exh. 3, A. 173). The landlord-tenant relationship between the government and its individual employee is well recognized by the Government's own regulations. (Plaintiffs Exh. 2, A. 146) Furthermore, the rental rates established, established by the rental regulations specify that the rental charges shall reflect the reasonable rental value thereof *to the employee* (Plaintiff's Exh 2, A. 166)

In spite of the seemingly complex and stringent controls over appellants' occupancies of their housing, and the fact such housing was exposed to the public there was no restriction on the right of the employee to place his own lock on the private portion of the residences (A. 57).

2. Under the California Constitution Article XIII, Section 1 and California Revenue & Taxation Code Sections 201, 104 and 107 respondent was required to assess appellant's possessor interests in improvements and land, owned by tax exempt entities, including the United States.

In response to Footnote 3, page 8, Brief For the Appellants, it should be pointed out, that while the Forest Service was authorized to and did lease privately-owned houses for its employees, outside of the National Forests, and on private land, assigning its employees thereto on the same basis as government owned housing located on federal land within the National Forests, that in making the lease payments (which usually were in excess of the amount charged to the employee by the government), the federal government was making an indirect payment to Appellee for an amount equal to the property taxes assessed to the private owner thereof. Under California law, the lessee and lessor of privately owned real property are

not separately assessed, with the owner-lessor being assessed for the full cash value of land and improvements and if leased, passing on the amount of the property tax to the lessee, in this case the government. No objection or challenge has been made to this practice, which presents something of an equal protection problem for the employee living in privately owned housing, paid for by the government, and not being separately assessed for a possessory interest for his personal beneficial interest in the government leased housing, as compared with the employee residing in government owned housing, and being separately assessed for his possessory interest in such tax-exempt property. As will be further developed in the argument to follow, constitutional principals do not prohibit the payment of such tax in either situation. *Alabama* v. *King and Boozer,* 314 US 1.

It should be emphasized that the trial court, while it held against Appellee County, did find at least an incidental personal benefit to each of the employees involved. The California District Court of Appeal, Fifth Appellate District, reversed the decision of the trial court in both cases, holding as a matter of law, that the individual appellants enjoyed assessable, taxable possessory interests in their government owned housing, (J.S. App B, 67a-68a) and that assessment of such taxes against the individual employee did not violate the Constitution. On Petition for Hearing to the California Supreme Court, said Court denied a hearing.

These cases now come before this Court on the appellant's sole contention that the imposition of such tax against the individual employee violates the United States Constitution, Article VI, Section 2 (Supremacy Clause); appellant's additional major contention that the California possessory interest tax as imposed, unlawfully discriminated against the United States and its employees, having been expressly abandoned. (Brief for Appellants, p. 15 FN 6).

SUMMARY OF ARGUMENT

The possessory interest tax assessed by respondent is a tax on the individual employee's property interest, and therefor is not a tax against an instramentality of the United States, even though the value of the Possessory Interest is measured by the value of government owned property which is not assessed. There is no possibility that any property owned by the government will be subject to a lien for unpaid taxes, as such unpaid taxes are by law, transferred to the unsecured property tax rolls, and collected as any other personal debt of the assessee. (Revenue & Taxation Code Section 4986). The individual employees, in being assessed for their own possessory interests in housing their families, are not clothed with the immunity of their employer, the United States. There is no burden imposed on the Government in the assessment or collection of these taxes, and their obligations of state citizenship requires payment of these taxes.

ARGUMENT

The California Possessory Interest Tax Imposed on the Personal Occupancy Rights of Federal Employees in Their Government Owned Housing Does Not Violate the Constitutional Immunity of the United States From State Taxation.

A. Introduction

McCulloch v. *Maryland* 4 Wheat 316 does not prohibit a state tax on a property interest of a Federal employee in Government owned housing. *McCulloch* dealt with a state tax on the notes of a Bank chartered by the United States, which was properly held invalid under the Supremacy Clause. (U.S. Const. Art VI, Sec 2). However, the prohibition against state taxation was limited to any tax or regulation on the "operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government." The Court expressly

excepted the "property" of such agency, stating at p. 436, "It (this opinion) does not extend to a tax paid by the real property of the bank in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the state."

So here, the possessory interest tax is laid against the employees possessory right or property, in his personal housing, which is taxed in common with all similar single family residences located with the state, owned by individuals or employees or tenants of tax-exempt entities.

The exception set forth in *McCulloch, supra,* was followed in *Osborne* v. *Bank of United States* 9 Wheat 738, Justice Marshall stating at page 867, "It is true that the property of the contractors may be taxed, as the property of other citizens, and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control." Also in accord: *Union Pacific Railroad* v. *Peniston* 18 Wall 5, 34-37.

It seems obvious that the possessory interest tax imposed against the personal beneficial use of government property by Forest Service employees cannot be construed to be a tax against the operations or instramentalities of the United States, and yet Appellants at page 13 of "Brief for the Appellants" contend that the tax is a direct tax against "the activities of the federal government itself." This is in spite of a complete lack of evidence in the case that the imposition of the California possessory interest tax had any effect at all on the operations of the Forest Service or its activities in administering the National Forests. Upon reflection it is difficult to perceive a situation where the tax could conceivably effect the Government.

The cases cited at page 14 in "Brief For Appellants" can be easily distinguished from the instant appeal. *Standard Oil Company* v. *Johnson* 316 US 481, involved a state license tax on the privilege of distributing gasoline, and was held to be inapplicable to sales to U.S. Military Post Exchanges, which were considered arms of the government (and also generally located in exclusive federal enclaves). *United States* v. *Boyd* 378 US 39, cited by appellants, actually supports the contentions of appellee. *Boyd,* involved a state *use tax* on property owned by the United States but used by a private contractor in implementing its contracts with the Government. In upholding the tax, the Court said at page 45, "... from the facts of this record it is incredible to conclude that the use of government owned property was for the sole benefit of the government." (Both companies had a separate taxable interest).

In *Department of Employment* v. *United States* 385 US 355, Colorado imposed an unemployment compensation tax upon the United States Red Cross, the tax being measured by the amount paid to its employees. Held, the Red Cross is an instrumentality of the U.S. for the purposes of immunity from State taxation levied on its operations, and the tax void. The distinguishing factor is that the state tax was laid directly on the federal instramentality and not against the personal, beneficial interest of the individual employee, as in the instant case.

The above-cited cases simply do not support appellant's argument that the "tax immunity of the United States covers the Forest Service and its personnel."

Such a contention flies directly in the face of decisions of this Court such as *Graves* v. *New York ex rel O'Keefe* 306 US 466 which upheld the right of the state to tax the income of a federal employee residing within the state, stating at page 481, "... the only possible basis for imply-

ing a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that of the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions. (held, this was not a sufficient basis for invalidating the tax).

Of more direct applicability to the tax in issue in the present case, is the language of the Court is *Graves, supra,* page 486 "(There is) no basis for a difference in result whether the taxed income the salary or *some other form of compensation.* No economic burden that would justify ... a tax payer being clothed with the implied constitutional tax immunity of the government by which he is employed ..."

Here, while the individual employees paid a rental or fee for their occupancy of governmental housing, there was evidence that the rentals paid were not commensurate with the actual cash value of the use and enjoyment of such housing. The fact that a rental fee was charged by the government at all would lend support to appellee's position, (and the District Court of Appeal's holding) that these employees did have a taxable personal benefit from their use of government housing. If in fact the value of the housing to the employee, exceeded the amount of the rental charge therefor, this difference would be a bonus or "another form of compensation" to such employee. Further, it is an elementary rule of economics that one does not pay for something that has no value to him.*

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*5 USC 75a provides "that the reasonable value of such allowance (for quarters furnished civilian employees) shall be determined and considered a part of the compensation in fixing the salary rate for such circumstances." This statute is discussed in "U.S. Congress & Administrative News," Vol. 2, 1964, page 3006 in connection with the legislative history of S. 1833, (House Report No. 1459, in part)

It would seem that if as appellants contend their sole purpose in occupying the government housing was for the convenience of the government, and to further facilitate the government's mission in administering the national forests that there would be no requirement that the individual employee pay a rent therefor. The idea of rent, equates a value in the use and occupation of the person paying such rent, and therefor such a value, "to the individual" is taxable.

The examples of non-taxability of soldiers use of governmental housing on military bases or the taxability of soldiers uniforms as set forth in Appellant's Brief, page 17 and 18 are specious and inapposite. Military bases are federal enclaves, and the taxation therein is specifically left to the Federal Government, by the acts of Congress creating them.

The decisions cited by appellant involving state taxation of Indian trust lands (*United States* v. *Richert* 188 US 432) and the case of *Irwin* v. *Wright* 258 US 219, are similarly

as follows: "This law established theequitable principal that the government should charge employees the reasonable value of quarters and related items furnished to them. However, it does not by its terms apply to those Government quarters which are occupied by members of the uniformed services on a rental basis..."

"Section 3 requires that rates for rental of quarters and charges for facilities shall be based on the reasonable value of the quarters and facilities to the employee... Reasonable value of the rental rates and charges will be determined by the rule of "equivalence" (with comparable private housing located in the same area)." At page 3012, *op cit*, there is reported a letter from Joseph Campbell, Comptroller General of the United States to the Honorable Tom Murray, H. R., dated May 13, 1964, which states in part: "Our experience with Circular A-45 indicates that in practice, some Government agencies have not been charging rents that are equivalent or comparable to rents charged for private housing in the area." Appellee's Chief Appraiser also found this to be true in assessing the possessory interests involved in this case. (A. 112).

inapplicable because of the peculiar nature of Indian trust lands and property in the first cited-case, and the fact that in the latter, it was held that a homesteader assessee had no taxable equitable interest.

In *S.R.A.* v. *Minnesota,* 327 US 558, cited by appellants, a state tax directly against an equitable interest of a private taxpayer, and purchaser of real property in which the United States held legal title for security purposes was upheld, distinguishing *United States* v. *County of Allegheny* 322 US 174.

B. Taxation of the Employees Possessory Interest in Government Owned Housing Is Not a Tax Against the Operations or an Instrumentality of the United States.

In *United States* v. *County of Allegheny, supra* this Court struck down a state tax levied on machinery owned by the United States located on real property owned by Mesta. In so holding, this Court at page 186, states "Mesta has some legal and beneficial interest in the property (machinery). Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. (Here) the State has made no effort to segregate Mesta's interest and tax it. The full value of the property including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment."

In the instant case, the employee's taxable interest in his personal living quarters has been segregated from any interest in the real property or improvement owned by the United States.

As the Court in *Allegheny, supra,* points out at page 187, 188, "The Government is an abstraction and its possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its

behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or *beneficial use* of the property may be taxed as we have held." (emphasis supplied).

Here, appellee has segregated the possessory interest of the employee, and levied a tax only against that interest. The government's interest has not been assessed.

Appellant's contentions are further bolstered by this Court's decisions in the so-called "Michigan" cases, which followed *Allegheny.*

Detroit v. *Murray Corp.* 355 US 489, involved a possessory interest tax against materials owned by the United States, in possession of a private contractor. In upholding the tax, this Court at page 491 stated, "These taxes were not levied directly against the United States or its property... (there was) no effort to hold the United States or its property accountable." And at page 493, "Lawful possession of property is a valuable right where the possessor can use it for his own personal benefit...There is no claim that the challenged taxes discriminate against persons holding government property. To the contrary the tax is a general tax which applies and has been applied throughout the state." (The same is true of the California possessory interest tax as has now been acknowledged by appellants in their Brief page 15, footnote 6.) The *Murray* Court distinguished its holding in *Allegheny, supra,* stating "Here state law specifically authorizes assessment against the person in possession and the taxing authorities were careful not to attempt to tax the Government's interest in the property" (as was the situation in the instant case), the Court concluding at page 495, "We find nothing in the Constitution which compels us to strike down these state taxes. There was no discrimination against the Federal

Government, its property or those with whom it does business. There was no crippling obstruction of any of the Government's functions, no sinister effort to hamstring its power, not even the slightest interference with its property. cf. *McCulloch* v. *Maryland," supra.*

In a companion case, *United States* v. *City of Detroit* 355 US 466, the Court upheld a state tax applied to a lessee of government property, the tax being measured by the value of Government property. The Court at page 470 recognized the commonplace principal of a tax on the "beneficial use of property itself." And at page 472, "Here we have a tax which is imposed on a party using tax-exempt property for its own 'beneficial personal use' and 'advantage', "(Citing cases including *Graves* v. *N.Y., supra.*)

This is precisely what the possessory interest tax in the instant case assesses.

The rationale is given by the court at page 474: "In the absence of such equalization (taxation of users of tax exempt property) the lessees of tax exempt property might well be given a distinct economic preference over their neighboring competitors, as well as escaping their fair share of local tax responsibility.... In this Court the trend has been to reject immunizing these private parties from non-discriminatory taxes as a matter of Constitutional law (cf. *Penn Dairies* v. *Milk Control Comm'n* 318 US 261).

In discussing the equal tax treatment of forest service employees, the voiding of the taxes assessed in the instant cases would have the following inequitable result. First, employees living in government owned houses located within the National Forests will not be required to pay any real property tax. Such employees will continue to send their children to schools supported by the local property tax, and receive all other County and State services, including roads, fire protection, welfare, and police protection paid for by

other real property, tax paying citizens. The Federal employee who resides just outside the boundary of the National Forest, but who works therein, and whose personal housing is leased for him by the United States, will not pay any possessory interest tax, but an increment of the lease payment from the Government to the owner thereof, will go to pay County taxes, and thus support the local schools and other services such employee, his wife and children are entitled to. The third employee, who works in the National Forest, but who lives just outside its boundaries in privately owned housing either rented directly from the private owner, or the employee purchasing such home, pays indirectly a portion of the lease payment as taxes or is assessed directly as the legal owner thereof based upon the fair market value of his land and improvements. All three employees, in this example, work for the same National Government are either "agents" or "instramentalities" thereof or are not, but in the first case according to appellants, the Supremacy Clause is violated but apparently not in the last two situations. This result is completely anamolous and unsupportable in law, reason or logic, or simple fairness to either the employees involved, or to the local government of which they are also citizens and, which supports them. It is also exceedingly unfair and a denial of equal protection to the rest of the taxpaying citizens of the County who are assessed for their interests in property to provide the revenue to operate local government, and who as a result must now pay more than their equitable share of taxes, to compensate for the windfall given to Federal employees, living in Government owned housing.

Appellee feels strongly that Congress did have this situation in mind when it adopted Title 16 United States Code Section 480 which provides as follows: "The jurisdiction, both civil and criminal, over persons within the national

forests shall not be affected or changed by reason of their existence, except so far as punishment of offenses against the United States therein is concerned; that the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State."

This statute has been construed to allow the taxation of private contractural interests in Government property located in the National Forests in *Wilson* v. *Cook* 327 US 474 and in *Georgia Pacific Corporation* v. *County of Mendocino, et al.* 327 F. Supp. 380. (C.A. 9)

If as contended by Appellants, these Forest Service employees, and their families are to be considered solely as "servants, agents, arms of, or wards" of the Federal Government, and thus immune from state, property taxation as constituent parts of the Federal Government, then perhaps their position is well-taken. However, it is an inescapable fact that such employees and their families are also citizens of the State in which they work and reside; one obligation of state citizenship being the payment of taxes to support such state government. *People* v. *Shearer* 30 Cal. 645. State Citizens generally have a place of relatively fixed location where they reside. Such citizens are assessed and pay taxes either directly if they own their residences, or indirectly if they rent or lease them. The individual appellants should be required to pay their fair share of such taxes. *Cohn* v. *Graves* 300 US 308, 313.

C. The California Possessory Interest Tax as Applied in the Instant Case, Creates No Burden on the Federal Government.

As was stated by the Court in *Graves* v. *New York,* 306 US 466 at page 480. "... when exemption from state taxa-

tion is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden and if it appears that there is no ground for implying a constitutional immunity there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity. . . . "The present tax . . . is not a tax upon the (Government) or its property or income, nor is it paid by the . . . (Government), or from its funds."

In the instant case, there was absolutely no evidence to show any possible burden on or embarrassment to the Federal Government in the assessment or collection of these taxes. In their "Brief for Appellants' page 18, they speculate that the County could "impose conditions upon residence of Forest Service personnel." There was absolutely no evidence to support any such fear. The appellee has no interest in how or to whom, or under what conditions the Government assigns or allows its personnel to occupy its residences. But once possession of such residences has been effected, appellee believes it has the Constitutional right to place a tax on such possession, based on the personal value to the employees. This, it is submitted, is no different than the state being able to tax the *income* of such employee, once it has been paid to him by the Government.

While the amounts of taxes collected in this case are not large, individually or collectively, the ability of the state to collect such possessory interest taxes is extremely important. As was pointed out by the Court in *Board of Supervisors* v. *Archer* 13 CA 3rd 717, 727. "... due to the fact that about half the land in California is in the public domain, the taxation of possessory interests in the State is a significant revenue item ..." Furthermore, the number

of Federal employees working and living in California has reached substantial numbers.*

If a significant number of such employees are allowed to escape real property taxation solely because they reside in Government owned housing, located outside of federal enclaves, the ability of the state to provide essential services to them in the form of schools, roads, welfare, police, fire, public health and the multitude of other local services, financed at least in part by the local property tax, will be severely limited. There has been no good reason advanced, nor does any good reason exist, why they should not be required to assume and pay for their obligation of state and local citizenship.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeal should be affirmed.

September 15, 1976.

Respectfully submitted,

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James B. Waterman,
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*U. S. News & World Report Vol. LXXXI No. 7, August 16, 1976, page 22, 25, "States with the most Government jobs No. 1 California, 297,837 Federal Civilian Employees, 3.8% of all non-farm jobs in State."

Appendix

Constitutional and Statutory Provisions Involved

California Revenue and Taxation Code

§ 201. Property taxable

All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code.

(Stats. 1939, c. 154, p. 1280, § 201.)

California Revenue and Taxation Code

§ 4986. Uncollected tax penalty or costs; order for cancellation; grounds; public property not subject to sale for delinquent taxes; municipal taxes

(1) All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the county legal advisor if it was levied or charged:

(a) More than once.

(b) Erroneously or illegally.

(c) On a portion of an assessment in excess of the ratio of assessed value to the full cash value of the property as provided in Section 401 by reason of the assessor's clerical error.

(d) On improvements when the improvements did not exist on the lien date.

(e) On property annexed after the lien date by the public entity owning it.

(f) On property acquired prior to September 18, 1959, by the United States of America, the state, or by any county, city, school district or other political subdivision and which, because of such public ownership, became not subject to sale for delinquent taxes.

(2) (a) On property acquired after the lien date by the United States of America, if such property upon such acquisition becomes exempt from taxation under the laws of the United States, or by the state or by any county, city, school district or other public entity, and because of such public ownership becomes not subject to sale for delinquent taxes, no cancellation shall be made in respect of all or any portion of any such unpaid tax, or penalties or costs, but such tax, together with such penalties and costs as may have accrued thereon while on the secured roll, shall be transferred to the unsecured roll pursuant to Section 2921.5 of this code, and collection thereof shall be made and had as provided therein, except that the statute of limitations on any suit brought to collect such taxes and penalties shall commence to run from the date of transfer of such taxes, penalties and costs to the unsecured roll, which date shall be entered on the unsecured roll by the auditor opposite the name of the assessee at the time such transfer is made. The foregoing toll of the statute of limitations shall apply retroactively to all such unpaid taxes and penalties so transferred, the delinquent dates of which are prior to the effective date of the amendment of this section at the 1959 Regular Session.

If any property described in this subdivision is acquired by a negotiated purchase and sale, gift, or devise after the lien date but prior to the commencement of the fiscal year for which current taxes are a lien on the property, the amount of such current taxes shall be canceled and neither the person from whom the property was acquired nor the public entity shall be liable for the payment of such taxes. If, however, the property is so acquired after the commencement of the fiscal year for which the current taxes are a lien on the property, that portion only of such current taxes,

together with any allocable penalties and costs thereon, which are properly allocable to that part of the fiscal year which ends on the day before the date of acquisition of the property, shall be transferred to the unsecured roll and be collectible from the person from whom the property was acquired. The portion of such taxes, together with any penalties and costs thereon, which are allocable to that part of the fiscal year which begins on the date of the acquisition of the property, shall be canceled and shall not be collectible either from the person from whom the property was acquired nor from the public entity.

In no event shall any transfer of unpaid taxes, penalties or costs be made with respect to property which has been tax-deeded to the state for delinquency.

For purposes of this subdivision (a) if proceedings for acquisition of the property by eminent domain have not been commenced, the date of acquisition shall be the date that the conveyance is recorded in the name of the public entity or the date of actual possession by the public entity, whichever is earlier. If proceedings to acquire the property by eminent domain have been commenced and an order of immediate possession obtained prior to acquisition of the property by deed, the date of acquisition shall be the date upon or after which the plaintiff may take possession as authorized by such order of immediate possession.

(b) If at the time exemption from sale attaches to land or improvements acquired by a public entity the purchase price thereof is deposited in the registry of a court in an eminent domain proceeding, all delinquent taxes, penalties and costs which were or are a lien against such land or improvements and the pro rata share of the current taxes, penalties and costs which are a lien against such land or improvements, prorated for the fiscal year for which such

current taxes, penalties and costs are or will be due and payable, shall be paid out of the award. The date for such proration shall be at the time title was transferred to, or possession was taken by, the public entity, whichever time the court determines to have first occurred. If the amount of the current tax is not ascertainable at the time the proration is made the same shall be estimated and computed by the court based upon the last equalized assessed value of the property in its entirety regardless of any segregation which may occur by reason of the taking, and the tax rate levied on the property for the immediate prior year. The court shall further order canceled the public entity's portion of any prorated current tax. The subject of the amount of the taxes which may be due on the property shall not be considered relevant on any issue in the condemnation action, and the mention of said subject, either on the voir dire examination of jurors, or during the examination of witnesses, or as a part of the court's instructions to the jury, or in argument of counsel, or otherwise, shall constitute grounds for a mistrial in any such action.

No cancellation under paragraph (b) of subdivision (1) of this section shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, collectible by county officers on behalf of a municipal corporation without the written consent of the city attorney or other officer designated by the city council unless the city council, by resolution filed with the board of supervisors, has authorized the cancellation by county officers. The resolution shall remain effective until rescinded by the city council.

For the purpose of this subdivision the date of possession shall be the date after which the plaintiff may take possession as authorized by order of the court or as authorized by a declaration of taking.

(Stats.1939, c. 154, p. 1366, § 4986. Amended by Stats.1941, c. 448, p. 1739, § 1; Stats.1941, c. 1009, p. 2641, § 1; Stats. 1944, 3rd Ex.Sess., c. 5, p. 31, § 2, operative May 16, 1944; Stats.1947, c. 851, p. 2023, § 11; Stats.1955, c. 844, p. 1460, § 1; Stats.1959, c. 1023, p. 3045; § 3; Stats.1961, c. 644, p. 1849, § 1; Stats.1963, c. 989, p. 2250, § 1; Stats.1963, c. 1072, p. 2531, § 1; Stats.1966, 1st Ex.Sess., c. 147, p. 679, § 96; Stats.1967, c. 553, p. 1902, § 1.)

California Constitution Art. 13 § 1

§ 1. Taxable property; exemptions; public property

Section 1. All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; provided, that a mortgage, deed of trust, contract, or other obligation by which a debt is secured when land is pledged as security for the payment thereof, together with the money represented by such debt, shall not be considered property subject to taxation; and further provided, that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation, except such lands and the improvements thereon located outside of the county, city and county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corpora-

tion; provided, that no improvements of any character whatever constructed by any county, city and county or municipal corporation shall be subject to taxation. All lands or improvements thereon, belonging to any county, city and county or municipal corporation, not exempt from taxation, shall be assessed by the assessor of the county, city and county or municipal corporation in which said lands or improvements are located, and said assessment shall be subject to review, equalization and adjustment by the State Board of Equalization. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this State.

Every act heretofore done and proceeding heretofore taken by this State or any taxing agency in the State in respect to the taxation of property belonging to the United States, is hereby validated and made legally effective from the date thereof, to the extent it would have been valid and legally effective if done or taken after the adoption of this amendment. (Amended Nov. 6, 1894; Nov. 8, 1910; Nov. 3, 1914; May 16, 1944.)

California Revenue and Taxation Code

§ 104. Real estate or real property

"Real estate" or "real property" includes:

(a) The possession of, claim to, ownership of, or right to the possession of land.

(b) All mines, minerals, and quarries in the land, all standing timber whether or not belonging to the owner of the land, and all rights and privileges appertaining thereto.

(c) Improvements.

(Stats.1939, c. 154, p. 1277, § 104.)

California Revenue and Taxation Code

§ 107. Possessory interests; security for payment of taxes; seizure and sale for delinquent taxes; suit against assessee

"Possessory interests" means the following:

(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

(b) Taxable improvements on tax-exempt land.

Except as provided in this section, possessory interests shall not be considered as sufficient security for the payment of any taxes. Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre, are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.

In the event of delinquency in the payment of any installment of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for the seizure and sale of possessory interests

in Sections 2914 to 2919, inclusive, at any time within three years after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof.

(Stats.1939, c. 154, p. 1277, § 107. Amended by Stats.1941, c. 8, p. 409, § 1, eff. Jan. 29, 1941, operative Feb. 1, 1941; 1943, c. 1143, p. 3078, § 1; Stats.1957, c. 753, p. 1968, § 1.)

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1262

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

COUNTY OF TUOLUMNE

On Appeals from the California Court of Appeal,
Fifth Appellate District

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1262

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

COUNTY OF TUOLUMNE

On Appeals from the California Court of Appeal,
Fifth Appellate District

Brief for the Appellees, County of Tuolumne

I. STATEMENT OF THE CASE

A. The Proceedings Below

For the 1967-68 fiscal year Appellee's Assessor determined that the individual Plaintiffs herein had taxable

possessory interests in the dwellings they occupied on the lien date in 1967 and entered assessments against the individual Plaintiffs accordingly. The dwellings occupied by the individual Plaintiffs were owned by and were located on real property owned in fee by the United States of America and were assigned to the individual Plaintiffs by the Forest Service of the United States Department of Agriculture as an incidence of their employment by said Forest Service. Those dwellings are located in the Stanislaus National Forest within the County of Tuolumne.

Each individual Plaintiff paid his respective property tax based on said possessory interest under protest and then applied to Appellee's Board of Supervisors sitting as a local Board of Equalization for cancellation of the assessment and for a refund of the taxes paid. The Plaintiffs' application was heard by the local Board of Equalization on November 14, 1967, and denied. The individual Plaintiffs then brought suit by and through Appellant United States of America to recover the taxes paid claiming that (1) no such possessory interest existed under California law, (2) if such a possessory interest existed under California law, assessment thereof was violative of the United States Constitution, and (3) if valid possessory interests existed, Appellee's Assessor's valuation thereof was excessive arbitrary and capricious.

The cause was tried by the Superior Court for the County of Tuolumne sitting without a jury on November 27 and 28, 1972. The trial court gave judgment for the Plaintiffs but reached only the first issue raised by Plaintiffs, concluding that the individual Plaintiffs did not have possessory interests under California law in those dwellings and, therefore, assessment and taxes based thereon were illegal and void. The trial court did not reach the other two issues raised by Plaintiffs.

The judgment of the Superior Court was appealed to the Court of Appeal of the State of California, Fifth Appellate District, which reversed the Superior Court for the reasons set forth in *United States of America, et al., v. County of Fresno* reported at 50 Cal. App. 3d 633. The Court of Appeal found that, as a matter of California law, possessory interests did in fact exist and that the United States Constitutional issue was unfounded. The United States then petitioned the California Supreme Court for a hearing, which was denied. The United States then appealed to this Court.

B. The Individual Plaintiff's Possessory Interests

On the lien date in 1967 the individual Plaintiffs herein were physically occupying the dwellings for which the possessory interests assessments were made (A. 282) and were using those dwellings as residences for themselves and their families (A. 260, 272, 275-6). The dwellings involved herein were single family residences and *not* mobilehomes, trailers or fire lookouts (A. 285-6) and were *not* located in isolated areas (A. 285-6). Those dwellings were thought to be adequate as homes for their families by the individual Plaintiffs (A. 272, A. 276). Those dwellings were occupied by the individual Plaintiffs pursuant to certain written regulations known as Budget Circular A-45 (Plts. Ex. 1, A. 123-139), the Forest Service Manual (Pltf. Ex. 2, A. 140-166) and the R-5 Western Regional Supplement (Pltf. Ex. 3, A. 167-189.) These regulations recognize generally accepted landlord-tenant relationships as applicable to the dwellings (Pltf. Ex. 2, A. 146).

With a few exceptions the individual Plaintiffs herein were not required to live in the dwellings and could freely select another residence not owned by the United States (Pltf. Ex. 2, A. 141). Thus, in most cases the individual

Plaintiffs freely chose government dwellings in which to reside. An individual may even appeal a superior's decision about the assignment of a government dwelling (A. 280) and may participate in selecting a particular dwelling (A. 272).

Rental rates for the dwellings are established under written regulations by sampling private rental rates for comparable housing in the area (Pltf. Ex. 1, A. 123-139; Pltf. Ex. 2, A. 147-165). The United States does not deduct the taxes paid for private housing to determine the rental of its quarters, thus turning a "profit" for the government. An individual occupying these dwellings may even appeal the rental rate established (Pltf. Ex. 2, A. 166), a right not enjoyed by most tenants in private housing. An adjustment in the rental rate is made for any space devoted to official use (Pltf. Ex. 2, A. 183). The United States recognizes that some infringement on the privacy of homelife exists by the nature of the employment, but does not adjust the rent accordingly (Pltf. Ex. 1, A. 161). Apparently the United States considers these dwellings comparable to private housing.

In their occupancy of the dwellings the individual Plaintiffs provide their own minor maintenance (Pltf. Ex. 2, A. 147; Pltf. Ex. 3, A. 169) just like most tenants in private housing. The individual Plaintiffs must pay for their own utilities (Pltf. Ex. 2, A. 164), again, just like most tenants in private housing. The dwellings occupied by the individual Plaintiffs are subject to inspections for official purposes (fire, safety) after advance notice (Pltf. Ex. 2, A. 147) which is in fact given (A. 264, A. 271, A. 276). Those inspections are primarily for protecting the dwelling, a normal concern of a landlord, and the occupant (A. 250-1). Nothing can be found in the regulations to allow a superior

to enter the dwellings for other than officially approved purposes. Although at least two of the dwellings involved herein had government radios in them which could be used by other than the occupant, use of those radios is limited to official business only (A. 245-247).

In sum, although there are some restrictions, the individual Plaintiffs were using these dwellings as homes for themselves and their families. It was this private beneficial use of the individual Plaintiffs that was the subject of the possessory interest tax imposed by Appellee; the tax was not against the United States or its property.

II. SUMMARY OF ARGUMENT

While *McCulloch v. Maryland,* 4 Wheat, 316, is still good law, it does not prohibit the possessory interest tax herein sought to be imposed on the individual Forest Service employees for their private beneficial use of the dwellings as homes for themselves and their families. The tax is not against the United States or its property but rather is against the private beneficial use made by such employees.

III. ARGUMENT

A. Introduction

McCulloch v. Maryland, 4 Wheat. 316, established the principle that the United States of America is itself immune from taxation by its constituent parts. Although decided in 1819 *McCulloch, supra,* is still the law of the land, as it were, as regards the immunity of the United States from taxation. However, *McCulloch, supra,* itself recognized that, although the United States is tax exempt, such exemption does not extend beyond the United States as an entity. Chief Justice Marshall speaking for the Court in *McCulloch, supra,* at page 436, said:

> "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

We must, therefore, review the immunity doctrine as it has evolved and as it applies to the facts of the instant case.

B. The Immunity Doctrine

The immunity doctrine was originally applied very harshly (see, e.g., *Collector v. Day,* 11 Wall. 113; *Dobbins v. Erie County,* 16 Pet. 435). However, the Court has retreated from that earlier harsh view and now regularly sustains non-discriminatory taxes against federal employees (*Graves v. New York ex rel. O'Keefe,* 306 U.S. 466) and government contractors (*City of Detroit v. Murray Corp.,* 355 U.S. 489, *United States v. Township of Muskegon,* 355 U.S. 484, and *United States v. City of Detroit,* 355 U.S. 466). Appellee concedes that none of the above-cited cases is directly in point and that all can be distinguished on their facts; Appellee believes that no case can be found that is directly in point. However, the principles enunciated therein establish the immunity doctrine, which doctrine then can be applied to our particular facts.

The above cases show that this Court has consistently taken a practical approach in analyzing any claim to immunity.

Appellants are relying on the direct immunity of the United States rather than any doctrine of implied immunity.

C. Forest Service Employees Not Instrumentalities of the United States in Use of the Dwellings Upon Which the Tax Was Imposed

Appellants in their brief concede that the interests of the individual Forest Service employees that are the subject of the possessory interest tax can be conceptually distinguished from the ownership interest of the United States. It is this very interest that is the subject of the tax. The individual Forest Service employees are not chattels as Appellants seem to assert. They are citizens of the State of California, enjoying its protection.

In their use of these dwellings they are acting like most any other citizen of California who rents property. The United States appears to be renting the property to the individual Forest Service employees in its proprietary rather than its governmental capacity. Although renting such property surely benefits the mission of the Forest Service, it does not make the individual Forest Service employees mere chattels controlled by the United States 24 hours a day. They are enjoying a beneficial personal use of the property in that they are living in them as a home for themselves and their families and in that they do not have to seek other housing on the private market. They enjoy all of the other benefits of citizenship as their counterparts in private housing do. The individual employees should contribute their fair share to support that citizenship.

D. Taxation of the Armed Forces Is Not an Issue

At two points in their brief Appellants bring up personnel of the United States armed forces. Such discussion only clouds the issue before the Court. Taxation of such personnel is not before the Court and any resolution thereof should be left to a time when a concrete set of facts regarding their taxation is before the Court.

E. Conclusion

Since the possessory interest tax is against the private beneficial use of the individual Forest Service employees and not against the United States or its property, the judgment below should stand.

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